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2<sup>nd</sup> Appellate Court, 2<sup>nd</sup> Dist, May Term  
a. d. 1947

10170

In re: ESTATE OF BLANCHE S. CHARTERS,  
Deceased.

GRACE MILLER and GUY MILLER,

Plaintiffs and Appellants

vs.

ROBERT L. WARNER, Administrator with  
the will annexed of the estate of  
BLANCHE S. CHARTERS, Deceased,

Defendant and Appellee.

4/60  
APPEAL FROM

CIRCUIT COURT,

LEE COUNTY.

Bristow, J.

333 I.A. 45<sup>1</sup>

On December 20, 1946 the Circuit Court of Lee County entered a judgment disallowing the claim of the plaintiffs, and entered judgment in favor of the Administrator.

The claim arises out of a note in the sum of \$3000, signed by the deceased, Blanche S. Charters, on Sunday, April 1, 1934. The note reads:

"\$3000.00 April 1 1934 After my death after date, for value received, I promise to pay Grace and Guy Miller, or order Sum of Three Thousand Dollars at Dixon, Illinois, with interest at the rate of 10 per cent per annum after After my death until paid.

"And to secure the payment of said amount, I do hereby authorize any attorney of any Court of Record to appear for me in such Court in term time or vacation at any time after this note becomes due; and confess a judgment without process, in favor of the legal holder of this note, for such amounts as may appear to be unpaid thereon, together with interest and costs and reasonable attorney's fees, and to waive and release all errors, and consent to immediate execution. Blanche Soule Charters P. O. Address Dixon, Ill. Due Due after death."

Simultaneous with the execution of the note she handed an Easter card to the Millers, which reads:

"1934 To whom it may concern - I would like to have - Mr.

Handwritten notes at the top of the page, including "Page 10" and "10/10/10".

Handwritten notes in the top right corner, possibly a list or summary.

Handwritten title or section header in the center of the page.

Handwritten text on the right side, below the title.

Main body of handwritten text, consisting of several paragraphs and lines of notes.

& Mrs. Guy Miller - for their kindness to me - to have the sum of - three thousand dollars - to take the mortgage off from home - Blanche Soule Charters".

On February 12, 1934, while the deceased was in the hospital, a written agreement was executed between the deceased and Grace Miller, one of the plaintiffs and the wife of Guy Miller, which reads:

"Dixon Hospital - Feb. 12, 1934 In agreement between Mrs. J. B. Charters and Grace Miller - Mrs. Charters promises to pay the sum of ten dollars a week for room and breakfast.

"After I Mrs. Charters pay a three thousand dollar note to City Bank or my income increases, I promise to pay sixteen dollars a week for room, breakfast, lunch and supper. Blanche Soule Charters Grace Miller".

February 16, 1934, Mrs. Charters left the hospital and went to the home of the plaintiffs where she remained until December 7, 1943. The record discloses that on June 12, 1939, Mrs. Rosbrook, a sister of the deceased, commenced weekly payments to the plaintiffs of Sixteen dollars each. Said payments continued until March 6, 1941. Thereafter the deceased was adjudged incompetent, and the appointed conservator continued to make such payments. On July 19, 1943, the plaintiffs filed a claim against the estate of Mrs. Charters for her care and supplies furnished for the period from February 16, 1934 to and including February 16, 1941, claiming the sum of \$334.75, due the Millers from the estate of said incompetent. Upon a hearing had on September 25, 1943, the court allowed \$400, which satisfied all obligations for the payment of money assumed by the deceased in the contract of February 12, 1934.

The deceased died March 5, 1944, and the claim was filed on June 5, 1944. Written objections to the claim were filed by Robert L. Warner, Administrator with the will annexed, setting forth seven reasons why the note should not be paid.

After a careful study of this record, we entertain no doubt that the motive and purpose of Blanche Soule Charters in executing and





delivering to the plaintiffs the note in question, for \$3000, was to make a gift to the Millers of that sum of money. If the gift of a promissory note could be upheld in law, the case would be free from difficulty. We are, however, constrained to hold that unless valid as a gift inter vivos, it can only be sustained on the theory that it was given for a valuable consideration. In 12 R.C.L. 940, Sec. 17, the author states:

"Donor's Own Note. - It is well settled as a broad general rule that a promissory note executed without consideration and intended merely as a gift inter vivos to the donee, cannot be made the basis of a recovery either at law or in equity by the donee against the donor or against his estate after his death. This is upon the ground that such a note is a mere promise, and that the gift of the note is the delivery of a promise only and not the thing promised, and a note without consideration, payable out of the estate of the maker after his death, is void."

We have carefully considered the record and are firmly convinced that the trial judge was fully justified in finding against the plaintiffs on the question of good and valuable consideration. Since the note must fail as a gift inter vivos, and since the finding of the trial court on the question of valuable consideration is fully sustained by the evidence, the only remaining question presented by the record is whether or not a note executed without any other consideration than that of a natural affection, or one without any valuable consideration, intended as a mere gift, can form the ground of recovery in an action at law. Mr. Justice Scholfield, on page 171 used the following language which is applicable to the facts under consideration; in the case of Williams v. Forbes, 114 Ill. 167:

"A note executed without any other consideration than that of natural affection, or one without any valuable consideration, intended as a mere gift, can not form the ground of recovery in an action at law. A gift is always revocable until it is executed, and a promissory note, intended purely as a gift, is but a promise to make a gift in the future. This gift is not executed until the gift is paid."



To the same effect is Richardson v. Richardson, 148 Ill.

563; Kelly v. Dyer, 359 Ill. 46; Mayer v. Mayer, 379 Ill. 97.

The judgment of the Circuit Court of Lee County is affirmed.

AFFIRMED.



44123

JOHN B. FOWLER,

Appellant,

v.

FIRST NATIONAL BANK AND TRUST COMPANY  
OF EVANSTON, a national banking cor-  
poration, Executor and Trustee under  
the Last Will and Testament of HENRY  
FOWLER, Deceased, ALICE FOWLER, MARGERY  
FOWLER SHARP, BESSIE FOWLER HART,  
CHARLES FOWLER, PHIL FOWLER, SIDNEY  
FOWLER, AMELIA LATHAM, WILLIAM FOWLER,  
THOMAS LATHAM, ELI LATHAM, BRITISH OLD  
PEOPLE'S HOME IN ILLINOIS, a corporation,  
GLENWOOD MANUAL TRAINING SCHOOL, a cor-  
poration, EVANSTON HOSPITAL ASSOCIATION,  
a corporation, NORTH SHORE AREA COUNCIL,  
BOY SCOUTS OF AMERICA, a corporation, ST.  
AUGUSTINE'S PROTESTANT EPISCOPAL CHURCH,  
a religious corporation,

Appellees.

33 I.A. 45

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Upon dismissal by plaintiff's attorney of the complaint to set aside the will of Henry Fowler, deceased, plaintiff filed a petition to vacate the order dismissing his complaint, on the ground that his attorney lacked authority. After issues were joined the cause was heard by the chancellor, who dismissed the petition. Plaintiff appeals.

The record discloses that on November 8, 1944, Henry Fowler died testate in Cook County, Illinois, and on November 21, 1944 the deceased's will was admitted to probate; that in his will the deceased appointed the First National Bank and Trust Company of Evanston as trustee, and gave his entire residuary estate to the trustee for division into thirty equal parts; that Edwin Fowler, Elizabeth Fowler Peterson, and John Fowler, adopted children of the decedent, were each named as beneficiary of

January 1, 1912

Dear Sir,

AT

Reference is made to your letter of the 28th inst. in relation to the matter of the proposed extension of the term of the lease of the land owned by the United States and occupied by the National Academy of Sciences. The Department has considered the matter and is of the opinion that the extension of the term of the lease should be granted for a period of five years, from the expiration of the present term, to the 31st day of December, 1917.

Very truly yours,

257-1112

The Department has also considered the matter of the proposed extension of the term of the lease of the land owned by the United States and occupied by the National Academy of Sciences. The Department is of the opinion that the extension of the term of the lease should be granted for a period of five years, from the expiration of the present term, to the 31st day of December, 1917.

a 1/30 share of the residuary trust estate. Afterwards, on August 15, 1946, these beneficiaries filed a complaint to set aside the will, alleging, among other things, that the deceased was not of sound and disposing mind and memory, and that certain defendants exercised undue influence and duress upon the deceased.

After issues were joined by all defendants the cause appeared on the trial call from time to time. On December 16, 1946 the cause appeared on the trial call of Judge U. S. Schwartz who was then engaged in the hearing of another case. Present at that time were the attorneys for both sides and the plaintiffs Edwin Fowler and Mrs. Elizabeth Fowler Peterson. They conferred in the Judge's chambers for the purpose of effecting a settlement. Later on the same day another conference was held between the plaintiffs and their attorneys. During these conferences plaintiff John Fowler was at his place of employment at Naukegon, Illinois, where his attorney, Kinne, communicated with him by telephone on several occasions that day. On the following day, December 17, 1946, Edwin Fowler withdrew as plaintiff, and on December 27, 1946 the cause was dismissed as to the remaining plaintiffs, "upon motion of plaintiffs by Harry C. Kinne, their attorney, and by agreement of all counsel."

The record further discloses that on January 27, 1947 Elizabeth Fowler Peterson and John Fowler were given leave to file a petition to vacate the order dismissing the complaint to set aside the will of the deceased. The petition alleges in substance that Elizabeth Fowler Peterson and John Fowler did not authorize their attorney Harry C. Kinne to dismiss their complaint, and that as soon as they learned of the dismissal plaintiffs retained other counsel and initiated the present proceedings to vacate the order.







In their answer defendants averred that the plaintiffs did authorize their attorney Harry C. Kinne to dismiss the suit; that Elizabeth Fowler Peterson did agree to accept her share of a settlement of \$2,000 for dismissal of the suit; and that each of the plaintiffs accepted checks in the sum of \$5,000 from the trustee as a payment on account of legacies bequeathed to them under the will of Henry Fowler, deceased. At the hearing before the chancellor on the instant petition plaintiff Elizabeth Fowler Peterson did not testify, nor does she join in this appeal.

The chancellor found that plaintiffs' attorney, Kinne, had authority to settle the cause and that plaintiff John Fowler having accepted the sum of \$5,000 bequeathed to him under the terms of the will of deceased is estopped from filing his petition to vacate the order of dismissal.

Plaintiff's sole contention is that Harry C. Kinne, his attorney of record at the time of the settlement, had no authority to dismiss the cause.

Plaintiff testified that he did not authorize his attorney Kinne or any other person to settle his case, nor did he sign or promise to sign any settlement agreement with anyone; that he first learned that the suit was dismissed on about January 2, 1947; that none of the parties, either plaintiffs or defendants or their attorneys, had told him about the dismissal; and that he never agreed to take \$666 as his share of the settlement.

The witness further testified that on December 16, 1946 he had about three telephone conversations with Kinne; that he "might have talked over the phone to Kinne on December 17, 1946," and that he spoke to Mr. Kinne on the morning and evening of December 27th. On redirect examination plaintiff testified that

in the same manner as the other two, but the results are not the same. The results of the first two experiments are given in Table I. The results of the third experiment are given in Table II. The results of the fourth experiment are given in Table III. The results of the fifth experiment are given in Table IV. The results of the sixth experiment are given in Table V. The results of the seventh experiment are given in Table VI. The results of the eighth experiment are given in Table VII. The results of the ninth experiment are given in Table VIII. The results of the tenth experiment are given in Table IX. The results of the eleventh experiment are given in Table X. The results of the twelfth experiment are given in Table XI. The results of the thirteenth experiment are given in Table XII. The results of the fourteenth experiment are given in Table XIII. The results of the fifteenth experiment are given in Table XIV. The results of the sixteenth experiment are given in Table XV. The results of the seventeenth experiment are given in Table XVI. The results of the eighteenth experiment are given in Table XVII. The results of the nineteenth experiment are given in Table XVIII. The results of the twentieth experiment are given in Table XIX. The results of the twenty-first experiment are given in Table XX. The results of the twenty-second experiment are given in Table XXI. The results of the twenty-third experiment are given in Table XXII. The results of the twenty-fourth experiment are given in Table XXIII. The results of the twenty-fifth experiment are given in Table XXIV. The results of the twenty-sixth experiment are given in Table XXV. The results of the twenty-seventh experiment are given in Table XXVI. The results of the twenty-eighth experiment are given in Table XXVII. The results of the twenty-ninth experiment are given in Table XXVIII. The results of the thirtieth experiment are given in Table XXIX. The results of the thirty-first experiment are given in Table XXX. The results of the thirty-second experiment are given in Table XXXI. The results of the thirty-third experiment are given in Table XXXII. The results of the thirty-fourth experiment are given in Table XXXIII. The results of the thirty-fifth experiment are given in Table XXXIV. The results of the thirty-sixth experiment are given in Table XXXV. The results of the thirty-seventh experiment are given in Table XXXVI. The results of the thirty-eighth experiment are given in Table XXXVII. The results of the thirty-ninth experiment are given in Table XXXVIII. The results of the fortieth experiment are given in Table XXXIX. The results of the forty-first experiment are given in Table XL. The results of the forty-second experiment are given in Table XLI. The results of the forty-third experiment are given in Table XLII. The results of the forty-fourth experiment are given in Table XLIII. The results of the forty-fifth experiment are given in Table XLIV. The results of the forty-sixth experiment are given in Table XLV. The results of the forty-seventh experiment are given in Table XLVI. The results of the forty-eighth experiment are given in Table XLVII. The results of the forty-ninth experiment are given in Table XLVIII. The results of the fiftieth experiment are given in Table XLIX. The results of the fifty-first experiment are given in Table L. The results of the fifty-second experiment are given in Table LI. The results of the fifty-third experiment are given in Table LII. The results of the fifty-fourth experiment are given in Table LIII. The results of the fifty-fifth experiment are given in Table LIV. The results of the fifty-sixth experiment are given in Table LV. The results of the fifty-seventh experiment are given in Table LVI. The results of the fifty-eighth experiment are given in Table LVII. The results of the fifty-ninth experiment are given in Table LVIII. The results of the sixtieth experiment are given in Table LIX. The results of the sixty-first experiment are given in Table LX. The results of the sixty-second experiment are given in Table LXI. The results of the sixty-third experiment are given in Table LXII. The results of the sixty-fourth experiment are given in Table LXIII. The results of the sixty-fifth experiment are given in Table LXIV. The results of the sixty-sixth experiment are given in Table LXV. The results of the sixty-seventh experiment are given in Table LXVI. The results of the sixty-eighth experiment are given in Table LXVII. The results of the sixty-ninth experiment are given in Table LXVIII. The results of the seventieth experiment are given in Table LXIX. The results of the seventy-first experiment are given in Table LXX. The results of the seventy-second experiment are given in Table LXXI. The results of the seventy-third experiment are given in Table LXXII. The results of the seventy-fourth experiment are given in Table LXXIII. The results of the seventy-fifth experiment are given in Table LXXIV. The results of the seventy-sixth experiment are given in Table LXXV. The results of the seventy-seventh experiment are given in Table LXXVI. The results of the seventy-eighth experiment are given in Table LXXVII. The results of the seventy-ninth experiment are given in Table LXXVIII. The results of the eightieth experiment are given in Table LXXIX. The results of the eighty-first experiment are given in Table LXXX. The results of the eighty-second experiment are given in Table LXXXI. The results of the eighty-third experiment are given in Table LXXXII. The results of the eighty-fourth experiment are given in Table LXXXIII. The results of the eighty-fifth experiment are given in Table LXXXIV. The results of the eighty-sixth experiment are given in Table LXXXV. The results of the eighty-seventh experiment are given in Table LXXXVI. The results of the eighty-eighth experiment are given in Table LXXXVII. The results of the eighty-ninth experiment are given in Table LXXXVIII. The results of the ninetieth experiment are given in Table LXXXIX. The results of the ninety-first experiment are given in Table LXXXX. The results of the ninety-second experiment are given in Table LXXXXI. The results of the ninety-third experiment are given in Table LXXXXII. The results of the ninety-fourth experiment are given in Table LXXXXIII. The results of the ninety-fifth experiment are given in Table LXXXXIV. The results of the ninety-sixth experiment are given in Table LXXXXV. The results of the ninety-seventh experiment are given in Table LXXXXVI. The results of the ninety-eighth experiment are given in Table LXXXXVII. The results of the ninety-ninth experiment are given in Table LXXXXVIII. The results of the hundredth experiment are given in Table LXXXXIX.

Kinne had sent him a check with a statement "in which he, Kinne, had deducted his fee, presumably from the \$666"; and that the witness had sent the check back to Kinne, "because I did not want to settle it."

In rebuttal plaintiff testified that in all of the conversations on December 16, 1946 with Kinne, he refused to settle the case for \$2,000, and directed Kinne to "try the case"; that about the 23rd of December, 1946, he had a talk with Kinne "about a document, a release or something, that my sister was supposed to have left with me," and that his sister, Elizabeth Fowler Peterson, never gave it (the order to dismise) to him; and that he never saw it or had it.

Murray C. Kinne, called by the defendants, testified in substance: that he has been practicing law in the State of Illinois for nearly forty-four years; that on December 16, 1946, while plaintiff's sister Elizabeth Fowler Peterson, his brother Edwin Fowler, and his attorney Edwin La Croese were present, he telephoned the plaintiff four times at his place of employment in Waukegan, Illinois; that he told the plaintiff that the defendants "had offered \$2,000 to settle this case, and that I wanted his (John Fowler's) consent to settle this case for \$2,000 payable to the three, his brother Edwin, his sister Mrs. Peterson, and himself"; that in later conversations during that day the witness told the plaintiff that the settlement had the approval of his sister and brother and also of La Croese, Edwin Fowler's attorney; that plaintiff told the witness "to go ahead and settle it if that is the best you can do"; that on the following day, December 17th, the witness told the plaintiff that the settlement had been made.



The witness further testified that Edwin Fowler had signed a written direction to him authorizing settlement of the case, which he (Kinne) gave to Elizabeth Fowler Peterson and "told her to take it to John (Fowler) and for her to sign it"; and that subsequently when Kinne asked John Fowler about the written direction authorizing him to dismiss the suit, John Fowler replied, "Well, it appears to be lost in the moving or something; I cannot find it."

Edwin La Crosse, called by defendants, testified that he maintained offices in New York City and was licensed to practice in the State of New York; that he was in Chicago on December 16, 1946 for the purpose of trying the case involving the will of the deceased; that he was present during the conferences in Judge Schwartz's chambers and at Kinne's office; that his client, plaintiff Edwin Fowler and Mrs. Elizabeth Fowler Peterson agreed to the settlement of \$2,000; that a written authorization to settle and dismiss the case was prepared by Kinne and was signed by plaintiff Edwin Fowler in the presence of the witness and that after Edwin Fowler signed the written authorization of settlement Kinne gave it to Elizabeth Fowler Peterson.

So far as the record shows, the only testimony bearing on the question of Kinne's authority to settle the litigation was that of plaintiff and of defendant's witness Kinne. The chancellor saw and heard them both testify. This court will not disturb the chancellor's findings unless it is apparent that they are clearly and palpably against the manifest weight of the evidence. (*Brosina v. Wanda*, 387 Ill. 46; *Elsmaster v. Miller*, 383 Ill. 243.) From a careful examination of the record, we think that there are circumstances corroborating Kinne's testimony and which amply warranted the chancellor's findings.



• *reality? Is it possible to*

No attempt is made by plaintiff to explain his delay in filing the instant petition after he learned that his suit had been dismissed. Nor is it disputed that he accepted the \$5,000 bequest from the trustee under the will of Henry Fowler, deceased. Plaintiff still retains the money and has made no offer to return it. The primary purpose of the present proceeding is to revive his bill of complaint which seeks to declare the will of Henry Fowler, deceased, to be null and void. Plaintiff's position is inconsistent since the law is well settled that a beneficiary cannot elect to accept that which is given him under a will and at the same time assert any claim which would defeat a full operation of the will. (Schluske v. Schluske, 364 Ill. 303; Balenske v. Balenske, 261 Ill. 374; Gorham v. Dodge, 122 Ill. 528.)

For the reasons indicated, the order denying the motion of the plaintiff John Fowler to vacate and set aside the order of dismissal of December 27, 1946, and dismissing the petition, is affirmed.

DECREE AFFIRMED.

KILBY AND BURKE, JJ. CONCUR.





44008

MAURICE W. SHOUP,  
Appellant,  
v.

ALEXANDER MOTOR GARAGE INC.,  
and T. SPALLA,  
Appellees.

297  
A  
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

333 I.A. 461

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order sustaining defendants' motion in the nature of a writ of error coram nobis, to vacate an ex parte judgment. Plaintiff has appealed.

June 24, 1941, plaintiff filed his action against defendants in tort. Defendants were served with summons and duly appeared filing Defenses. September 2, 1941, the case was postponed to the next jury calendar. May 31, 1944, on defendants' motion the case was dismissed for want of prosecution. June 2, 1944 the order of dismissal was vacated and the cause reinstated. August 11, 1944, it was placed on Calendar 3. October 16, 1944, it was postponed to November 28th then to January 12, and finally to April 3, 1945. On the last date, in the absence of defendants or their attorney, a jury was waived, the court heard evidence and entered an ex parte judgment for plaintiff and against defendants for \$1,000.

May 31, 1946, defendants filed a motion and on June 21 an amended motion, to vacate. It is stated in the motion that on the day of dismissal, May 31, 1944, defendants were in court with their attorney; that the attorney of record for defendants received no notice of the motion by plaintiff, June 2, 1944, to reinstate the cause; that defendants had no knowledge of the



motion and the subsequent reinstatement and were not present at the ex parte trial; that execution did not issue until February 1946, and that the Bailiff was given no address at which to serve the defendants; that they were not served; that March 4, 1946 the Bailiff returned the summons certifying that neither the defendants nor their property were found in the City of Chicago; that at the time and for the previous 40 years and 15 years respectively the individual defendant and the corporate defendant had lived at the same addresses and were listed in the Chicago Telephone Directory; that March 18, garnishment proceedings were instituted against the Central National Bank of Chicago, which notified the defendants; and that this was the first knowledge that defendants had of any proceedings in the case following the dismissal order of May 31, 1944. The motion concluded stating that the facts recited are not of record, were not known to the court when the judgment was entered and, if then known, would have induced the court not to enter judgment. The motion was supported by an affidavit of the defendants' attorney of record at the time judgment was entered. That affidavit states that he "never received" the notice of the motion to vacate the dismissal order. The prayer was for a trial on the merits.

August 5, 1946, the court entered an order overruling plaintiff's motion to strike defendants' amended motion and giving plaintiff leave to file a counter-affidavit and defendants leave to answer the affidavit. Plaintiff's attorney filed a counter-affidavit, stating that on May 31, 1944 about 9:40 A. M. he appeared in court and learned of the dismissal; that about 11 A.M. he telephoned Attorney Balsamo for defendants, requesting a stipulation to reinstate and that the request was denied; that he thereupon informed Balsamo that he would serve notice of his motion to vacate

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the dismissal; that the same day he served notice by mail and that the envelope containing the notice, though properly mailed, has not been returned; and that June 2, 1944, Balsamo called him to learn what happened on the motion and was informed of the reinstatement.

Defendants, pursuant to the leave granted, filed another affidavit through their Attorney Ward. This affidavit states that August 5, 1946, a hearing was had on defendants' amended motion to vacate and plaintiff's motion to strike; that in support of the motion and affidavit, Attorney Balsamo came from Georgia and confirmed the allegation in his affidavit that he had not received a notice; and that plaintiff's counsel cross-examined Balsamo, avoiding, however, any examination with reference to plaintiff's attorney's alleged telephone conversations with Balsamo.

August 22, 1946, the court entered the order appealed from. Defendants made a motion in this court to dismiss the appeal on the ground that the order was not final and not appealable. The motion was denied (January 10, 1947). This proceeding is independent of the suit wherein the judgment vacated was rendered and the order vacating the judgment is appealable. Central Bond and Mortgage Co. v. Roeser, 323 Ill. 90; Lynn v. Multhauf, 279 Ill. App. 210.

Plaintiff argues that defendants' amended motion to vacate makes no showing of a mistake of fact unknown to the court at the time of judgment and brought about by fraud, duress or inexcusable mistake. He cites People v. Bristow, 391 Ill. 101. He contends the motion is insufficient in alleging failure to receive notice and in failing to state why it was not received. Defendants argue that plaintiff's motion to strike the amended motion to vacate, admitted the allegation that notice was not received. This point was waived by defendants when they introduced testimony of Attorney Balsamo in support of the allegation.

The motion to strike does not appear in the record. We have no way of knowing from the record what it specified. Sec. 45, O. P. A.



It appears that Attorney Balsamo testified in support of the motion and was cross-examined by plaintiff's attorney. Furthermore, after denial of the motion to strike, plaintiff filed a counter affidavit joining issue with the defendants. Under these circumstances the alleged insufficiency of defendants' amended motion is waived. Martin v. Cole, 331 Ill. App. 597; 73 N. E. (a) 633; Rothenburg v. Seifried, et al, 322 Ill. App. 701; 54 N. E. (2) 707; Gray v. First National Bank, 320 Ill. App. 682.

The court's decision was upon a question of fact. Central Bond and Mortgage Co. v. Rosser. There was before the court an affidavit of plaintiff's attorney that notice had been mailed. This met the requirement of Rule 5 of the Municipal Court. There were also the affidavits on behalf of the defendants and the testimony of Attorney Balsamo. There is no transcript of that testimony in the record. We assume the court considered the testimony in rendering its decision. We presume there was testimony which convinced the court that the notice was not received. This fact was not before the court at the time the ex parte judgment was entered. Obviously the court would not have rendered the judgment had it then known defendants had received no notice of the reinstatement of the case and had no knowledge of its subsequent course. These conclusions seem to us to bring the instant case within the rules announced in North Avenue Building Assn. v. Huber, 286 Ill. 375; Jacobson v. Ashkinaze, 337 Ill. 141; Lusk v. Bluhm, 321 Ill. App. 349. This, despite the fact that plaintiff's attorney in the instant case complied with court rules and rulings, while the attorneys in the three cases cited did not. We need consider no further points.

For the reasons given the order of the Municipal Court vacating judgment for plaintiff is affirmed.

ORDER AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.





44047

ERWIN FIELDS and J. BEAUHARNAIS  
doing business as Fields &  
Beauharnais,

Appellees,

v.

JOSEPH S. BERG and TILLIE BERG,  
his wife, ARTHUR A. BERG and  
FLORENCE BERG, his wife, individually  
and as copartners doing business as  
BERG MFG. AND SALES CO.,

Appellants.

APPEAL FROM

CIRCUIT COURT

COCK COUNTY.

297  
3331.A. 45

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a proceeding in the nature of a writ of error  
coram nobis to set aside an order of dismissal. The court  
vacated the order and the defendant has appealed.

On May 14, 1946 plaintiff filed a suit for \$100,000  
damages, including a \$2,000 deposit, for breach of contract.  
Defendants filed a motion to strike and thereafter on August 7th,  
in vacation, the cause was dismissed "pursuant to stipulation."  
The stipulation recites that "all matters in dispute between the  
parties" have been settled. It is signed "Erwin Fields & J.  
Beauharnais by Erwin Fields (Partner)" and "Teller, Levit &  
Silvertrust."

On November 4, 1946 the court, through the judge who  
had entered the dismissal order, upon notice and motion gave  
leave to Beauharnais to file his petition in the instant proceed-  
ing. Hearing on the petition was set for November 15th without  
further notice.

The petition alleges the events leading to the dismissal  
order; the knowledge of defendants of the copartnership of Fields  
and Beauharnais and defendants' dealing with them as such; the  
voluntary dissolution June 26, 1946 of the copartnership, and  
the subsequent process of liquidation, all known to defendants;

JOHN T. LEE and J. W. LEE  
being witnesses as to the  
deposition.

Witnesses,

7.

JOHN T. LEE and J. W. LEE  
his wife, LEE, and  
LIEBOWITZ, who are, respectively,  
and as co-defendants in the case as  
above set out.

Witnesses.

THE COURT then ordered the return of the writ.  
This is a proceeding in the nature of a writ of habeas  
corpus and is not subject to the rules of evidence. The court  
received the order and the return of the writ.

ON MAY 14, 1943, LEE, LIEBOWITZ and LEE, his wife, were  
damaged, including a \$1,000 loss of wages, the return of the writ.  
LIEBOWITZ filed a motion for return of the writ and return of the writ.  
in vacation, but was not granted. LIEBOWITZ, however, is  
The situation remains that "all return of the writ and return of the writ.  
parties have been notified. It is ordered that the writ be  
returnable by John T. Lee (respondent) and LIEBOWITZ, and LEE, his wife,  
LIEBOWITZ."

On November 4, 1943, the court, after the parties were  
had entered the return of the writ, was notified and return of the writ.  
have to respondents in the writ and return of the writ and return of the writ.  
ing. Based on the return of the writ and return of the writ and return of the writ.  
further notice.

The court also ordered the return of the writ and return of the writ.  
order; the knowledge of respondents of the return of the writ and return of the writ.  
and respondents and respondents, including the return of the writ and return of the writ.  
voluntary dissolution and the return of the writ and return of the writ.  
the respondent's return of the writ and return of the writ, all return of the writ and return of the writ.

that Fields colluded and conspired with defendants to secure the dismissal order; that defendants, through their attorneys, with knowledge of circumstances and without petitioner's consent paid Fields \$1,000 for the stipulation; that the defendants' attorneys in procuring the dismissal represented to the court that all parties had signed the stipulation and failed to state petitioner had no knowledge of it; that neither petitioner nor his attorneys had notice of the stipulation or motion to dismiss; that defendants' attorneys excused lack of notice on grounds that all parties were in agreement; that the court on the representations entered the order; that all matters between the parties had not been settled; and that the trial court would not have entered the order had it known the facts.

It is further alleged that liquidation of the partnership was completed about September 10, 1946; that the partnership interest of Fields was bought by plaintiff for \$1,507.12; that incidental to this agreement Fields informed plaintiff the damage suit was still pending against defendants; that he would cooperate with petitioner in prosecution of the suit; that in event of settlement or judgment the proceeds would be divided equally between them; that Fields, contrary to his obligation accepted, without petitioner's knowledge or without informing him, the \$1,000 for the stipulation; that petitioner had no knowledge of those facts until October 25, 1946; and that defendants' attorneys deliberately misled petitioner's attorney on several occasions after dismissal into believing that the damage suit was pending, and failed to disclose the dismissal order.

The petition was sworn to by Beauharnais. The affidavit by his attorney was filed with the petition. It affirms the allegations with respect to the deceit of defendants' attorneys, giving dates, names and parts of conversations. It is stated therein that the first knowledge of the affiant of the dismissal

That these collected and considered with deliberation in regard to  
 alleged facts; that defendant, through their knowledge, with  
 knowledge of circumstances and without collusion, covered  
 said trial 1,000 for the defendant; that the defendant  
 attorneys in treating the alleged testimony to the jury  
 that all parties and signed the deposition and failed to show  
 defendant had no knowledge of it; that defendant covered up  
 his attorneys had notice of the deposition so called to witness;  
 that defendant's attorneys covered up of being so through  
 that all parties were in agreement; that the jury in the case  
 sent those entered the order; that all parties before the jury  
 had not been notified; and that the trial court could not have  
 entered the order had it known the facts.

It is further alleged that violation of the law  
 also was committed under section 10, 1905; that the defendant  
 interest in this was sought by plaintiff for \$1,000; that  
 plaintiff to this agreement failed to show plaintiff the facts  
 and was still seeking further agreement; that he could communicate  
 with defendant in violation of the law; that he could  
 agreement to judgment the proceeds were as divided equally  
 between them; that while, contrary to his obligation, plaintiff  
 without defendant's knowledge or without informing him, he  
 1,000 for the defendant; that defendant had no knowledge of  
 those facts until October 15, 1905; and that defendant's attorneys  
 deliberately aided defendant's attorney in having defendant  
 after plaintiff had notified that the same was being  
 and failed to disclose the plaintiff's error.

The plaintiff was aware of no communication. The plaintiff  
 by his attorney was taken with the plaintiff. It is alleged  
 allegations with regard to the facts of defendant's attorney  
 giving false, untrue and false testimony. It is alleged  
 therein that the facts known by the witness of the plaintiff



order was October 22nd when defendants' attorneys informed him by telephone.

On November 15th there was a colloquy between the court and counsel. The court sought to learn why the stipulation was presented as an emergency matter in vacation and whether there was a misrepresentation of the fact of petitioner's knowledge of the stipulation. The order of dismissal followed.

Defendants contend that the proceeding was irregular and erroneous because they were not properly notified or ordered to plead under Circuit Court Rule No. 54. The defendants had notice of petitioner's motion for leave to file the petition. They were represented by counsel on November 15th at the hearing, and participated in the hearing. They were entitled, under Rule 54, to file a motion or pleading. They filed neither. They did not ask for leave to do so at the hearing. We conclude that they waived these contentions.

Defendants argue that it is difficult to ascertain the grounds for the court's ruling. The trial court was not required to state its reasons. If it did so, however, we would disregard erroneous reasons if we considered the court's ruling correct.

It will serve no purpose to discuss the law pertaining to the rights of third persons in dealing with a member of a partnership. The question is whether the petition sets forth any error of fact unknown to the court when the dismissal order was entered and, if known would have prevented the entry of the order. We infer from the court's ruling in the instant proceeding that had it known the facts alleged in the petition on August 7th the dismissal order would not have been entered on the stipulation. The question is not whether the stipulation is good as against



petitioner. The question is whether the facts presented would have, and should have, prevented the trial court from dismissing the cause. The court did not know at the time that the partners had agreed to dissolve the partnership and were liquidating the partnership affairs; that the defendant had knowledge of these circumstances; that petitioner had no knowledge of the stipulation and that it was deceitful and without his consent; and that the defendants through their attorneys misrepresented to the court that, as all parties had stipulated, notice of the motion for dismissal was unnecessary.

There are facts alleged in the petition which occurred after the order of dismissal. These had to do with the agreement between the partners that the suit would be prosecuted or settled with the cooperation of Fields, and that Fields when this agreement was made represented to the petitioner that the cause was still pending. The conversations between the attorneys which are alleged also occurred after the entry of the order of dismissal. The conversations are admitted by defendants in this court to be true. They object that all of the conversations were not included in the allegations. While these facts could not have been before the court when the dismissal order was entered, they do shed light on the facts which petitioner claims should have been before the court.

The stipulation was signed by defendants' attorneys and by Fields. It was neither signed nor O.K'd by the attorneys of record for plaintiff and petitioner. This appeared from the stipulation, which the court presumably read before entering the order. Had the court been apprised of the facts alleged by petitioner it is fair to assume it would have made inquiry about the absence of the signature or approval of the attorneys of record. Having been advised further we believe he would not have dismissed the cause





upon the stipulation. We cannot say under the particular circumstances of this case it was the duty of the court to dismiss the case. (27 O. J. S. 162; McLane v. Romano, 322 Ill. App. 700.)

Technically, by not filing a motion to attack the petition, defendants did not present to the trial court the question of the legal sufficiency of the petition, and the matter could be said not to be before us. (Central Bond Co. v. Roeser, 323 Ill. 90.) During the colloquy on November 15th, however, there was discussion of the sufficiency of the petition. We are not disposed to refuse to pass on the question.

The judgment is affirmed.

JUDGMENT AFFIRMED.

LEWIS, P.J. AND BURKE, J. CONCUR.

upon the affidavit. In regard to the petition, the court is divided  
 equally of this case it was the duty of the court to decide  
 the case. (See H. L. 187; Shaw v. Shaw, 100 Ill. 100.)  
 Therefore, it was held that the petition was  
 valid, because it did not contain any of the facts  
 upon which the court is divided, and the  
 petition could be set aside as being in error. (See Shaw v. Shaw, 100 Ill. 100.)  
 However, there was discussion of the petition in the opinion.  
 It was not deemed to require to be set aside.

The judgment is affirmed.

CONCURRENCE.

1877, 100 Ill. 100, 101.

*Abstract*

333 *Att. app.*  
2-14-48

A

STATE OF ILLINOIS

APPELLATE COURT

THIRD DISTRICT

Gen. No. 9519

Agenda No. 1

People of the State of Illinois,  
Plaintiff-Defendant in Error,

Error to

vs.

Circuit Court

Iva Kidd, alias Iva K. Sandusky, and  
Mary Jane Kidd,  
Defendants-Plaintiffs in Error.)

of Vermillion  
County

Wheat, P. J.

333 I.A. 151

Plaintiffs in error, Iva Kidd, alias Iva K. Sandusky, and Mary Jane Kidd, were convicted by a jury in the Circuit Court of Vermillion County, of conspiring to do illegal acts injurious to the administration of public justice, in violation of Section 139, Chapter 38, Illinois Revised Stat<sup>ut</sup>es 1941. The indictment charged, in substance, that they attempted to acquire a part of the estate of one Rochester Sandusky, deceased, by filing for probate a forged will, by filing a forged pre-nuptial agreement, and by claiming that Iva Kidd was the widow of decedent. The Circuit Court sentenced each to serve a term of one year in the State Reformatory for Women, from which judgment this writ of error follows.

The People have filed, in this Court, a motion to strike the Report of Proceedings on the grounds that the same was not submitted to the trial judge for his certificate of correctness nor filed in the trial court

2013

*agreement on the merits*  
*per 1-22-48*  
within the time prescribed by statute or rule of court, or extension thereof, and that the trial judge was without authority to sign or certify to its correctness on April 22, 1942. The motion was ordered taken with the case.

The case was tried before the Hon. Ben F. Anderson, one of the judges of the Fifth Judicial District, who sentenced the defendants on September 29, 1945. On November 25, 1945, plaintiffs in error filed a motion for extension of time in which to file the Report of proceedings, pursuant to which an order was entered November 29, 1945, extending such time fifty days. It is noted that this order was entered sixty-one days after the judgment order was entered. The Report of proceedings was ordered filed January 19, 1946, by Judge Platt, without the certificate of the trial judge, and thereafter, on April 22, 1946, was signed by Judge Anderson (the trial judge) without prejudice to the People and ordered re-filed as of such latter date. Rule 70A of the Supreme Court (Illinois Revised Statutes 1945, Chap. 110, Sec. 219.70A) provides as follows: "In all original cases in which writ of error is brought, the bill of exceptions or report of proceedings \* \* \* shall be procured by the plaintiff in error and submitted to the trial judge or his successor in office for his certificate of correctness \* \* \* and filed in the trial court, within fifty (50) days after judgment was entered, or within such time thereafter as shall, during such fifty (50) days, be fixed by the court, or in such further time as may be granted within any extended time."





In the case of The People v. Horak, 366 Ill. 130, the time for filing the bill of exceptions had been extended to and including June 17, 1940, and on June 18, 1940, by order entered nunc pro tunc as of June 17, 1940, the time for filing bill of exceptions had been further extended to July 18, 1940. The Court said: "The sole question in this case is whether the court properly refused to sign the original bill of exceptions because it was not presented on or before June 17, 1940, or within the time extended for the filing thereof. This question has been decided many times by this court. If a bill of exceptions is not presented within the time fixed by the court, or within such additional time as the court may allow before the expiration of the time fixed for filing the same, it loses jurisdiction of the proceedings, and any orders purporting to extend the time for filing subsequent to the expiration date are totally void. People v. Keller, 353 Ill. 411; People v. Miller, 366 Ill. 56; People v. Duvvelonok, 337 Ill. 636; People v. Irwin, 293 Ill. 51. There is nothing in the record showing any ground for the court entering a nunc pro tunc order. There is no memorial appearing in the record upon which the court could correct the record nunc pro tunc, and hence the nunc pro tunc order was void. People v. Keller, 353 Ill. 411; Wake v. Strubel, 121 Ill. 321; Richter v. Chicago and Erie Railroad Co., 273 Ill. 625."

The case of Lukas v. Lukas, 361 Ill. 4<sup>29</sup>~~30~~, concerned a divorce action and construed a rule analogous to Rule 70 A. There was no appearance by the appellee, but the court, of its own motion, ordered the report of proceedings stricken.



The opinion states: "When the notice of appeal was filed, appellant was required to file the report of proceedings in the trial court within fifty days thereafter. (Rule 33 (1) (c).) The time, therefore, within which the report of proceedings could be filed expired on July 1, 1942. Rule 33 further provides that the trial judge may, for good cause shown, extend the time allowed for filing the report of proceedings. The application for such extension, however, must be made before the expiration of the time allowed by the above rule. No such application for extension was made in this case within fifty days following the filing of the notice of appeal. The trial court, however, on July 8, entered an order nunc pro tunc as of May 23, 1942, extending the time for filing the report of proceedings to August 15, 1942. This order was entered fifty-seven days after the appeal was perfected by filing the notice of appeal. The court had no power at that time to enter a nunc pro tunc order extending the time for filing the report of proceedings. People v. Miller, 365 Ill. 56; People v. Koller, 363 Id. 411."

The opinion in the case of The People v. Mobley, 390 Ill. 535, expressly construed said Rule 70 1/2 to mean that any application for extension of time in which to file a bill of exceptions must be made within fifty days from the date of judgment, and that any order entered thereafter was void.

From the above, it is apparent that the trial court lost jurisdiction to extend the time for filing the report of proceedings fifty days after the date of judgment, and that the purported extension order entered November 29, 1945, (being sixty-one days after judgment) was void. Equally a nullity was the order of filing without signature entered









The indictment was returned October 9, 1942. Nothing before the Court indicates that Mr. Henderson had any connection with the civil proceedings after the disposition of the Circuit Court case on September 13, 1942. A State's Attorney is not prohibited from practicing law in civil cases. The statute above quoted was intended to prohibit State's Attorneys from handling civil cases in which it might reasonably be inferred that prosecution would follow as a result of the same state of facts, or where he had already prosecuted a criminal case arising out of such facts. A reading of the opinion in the civil appeal above referred to does not indicate that the attorney representing the estate could have anticipated that State would appear prosecuting the prosecution of subsequent criminal proceedings. Likewise, it does not appear that Plaintiffs in error were prejudiced or denied a fair trial by reason of the State's Attorney having appeared in the earlier civil proceedings, and no motion to disqualify appears in the record. It is the opinion of this court that this assignment of error is without merit.

The judgment of the Circuit Court of Vermillion County is therefore affirmed.

Affirmed.



44057

DANIEL P. O'NEILL,  
Appellant,

v.

LEO M. SAGE, Administrator  
of Estate of THOMAS WALSH,  
Deceased,  
Appellee.

)  
)  
) APPEAL FROM CIRCUIT  
) COURT OF COOK COUNTY.  
)

3331.A.152

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A tort action for alleged injuries to plaintiff's person and automobile. A jury returned a verdict finding defendant not guilty. Plaintiff appeals from a judgment entered upon the verdict.

The complaint consists of two counts. Count one alleges:

"(1) That on August 4, 1944, Daniel P. O'Neill, plaintiff, was lawfully driving his automobile in an easterly direction upon Augusta Avenue, in Village of Oak Park, Cook County, Illinois, while in the exercise of due care.

"(2) That as the plaintiff reached the intersection of Augusta Avenue with Austin Boulevard, which is the dividing line between the City of Chicago and the Village of Oak Park, the green light at said intersection was in his favor, permitting east and west traffic on Augusta Avenue to proceed in an easterly and westerly direction, and the red light was against northerly and southerly travel on Austin Boulevard, the dividing line between the Village of Oak Park and the City of Chicago, Thomas Walsh since deceased, carelessly and negligently drove, operated and managed his automobile in a southerly direction upon Austin Boulevard through the red light at Augusta Avenue.

"(3) That at the time and place aforesaid, Thomas

DAVID L. O'NEILL,  
 Plaintiff,

v.

EDWARD A. GALT, Administrator  
 of Estate of THOMAS MARY,  
 Deceased,  
 Defendant.

STATE OF ILLINOIS  
 COUNTY OF COOK

THE JUSTICE OF THE PEACE FOR THE COUNTY OF COOK, ILLINOIS, do hereby certify that the foregoing is a true and correct copy of the original as the same appears from the records of the County of Cook, Illinois, and that the same is a true and correct copy of the original as the same appears from the records of the County of Cook, Illinois, and that the same is a true and correct copy of the original as the same appears from the records of the County of Cook, Illinois.

Witness my hand and seal of office this 1st day of June, 1934.

(1) That on August 2, 1934, David L. O'Neill,

Plaintiff, was lawfully driving his automobile in an easterly direction upon Augusta Avenue, in the Village of Oak Park, Cook County, Illinois, while in the exercise of due care.

(2) That at the time and place aforesaid, the defendant

of Augusta Avenue with Austin Boulevard, which is the dividing line between the City of Chicago and the Village of Oak Park, the green light of said intersection was in his favor, permitting east and west traffic on both streets to proceed in an easterly and westerly direction, and the red light was against northerly and southerly travel on Austin Boulevard, the dividing line between the Village of Oak Park and the City of Chicago, Thomas Mary, since deceased, carelessly and negligently drove, operated and managed his automobile in a southerly direction upon Austin Boulevard through the red light as aforesaid. That at the time and place aforesaid, David

Walsh so carelessly and negligently drove his automobile through the red light that said automobile ran into and collided with the automobile of the plaintiff and caused the same to be greatly damaged and caused severe bodily injury to the person of the plaintiff.

"(4) That at the time and place aforesaid it was the duty of Thomas Walsh that his automobile be driven in a proper and careful manner and that he should be mindful of the rights and safety of persons and property in, upon and at said intersection, but plaintiff charges the automobile of Thomas Walsh was carelessly and negligently being driven, operated and managed and that Thomas Walsh deliberately drove through and against the traffic signal at said intersection and after colliding with the automobile of the plaintiff, his automobile careened in a southeasterly direction across said intersection, up over the curb in its path on the south side of Augusta Boulevard, and upon, into and against a porch, on said south side of Augusta Boulevard.

"(5) That as a result and in consequence of the negligence aforesaid and as a direct and proximate result of the careless and negligent conduct of Thomas Walsh and the collision and impact of his automobile and the automobile of the plaintiff, the plaintiff was thereby greatly injured and was hospitalized and required surgical operations, for a long period of time during which he suffered great pain and was prevented from attending to his usual affairs and duties, and lost great gains and profits that he otherwise would have acquired, and has paid out divers sums of money in and about endeavoring to be healed; and further his automobile was greatly damaged and he was unable to use it for a long period of time and expended large sums of money in having

Wish as carefully and negligently drive his automobile  
through the red light and said automobile ran into the  
collision with the automobile of the plaintiff and caused  
the same to be greatly damaged and caused severe bodily  
injury to the person of the plaintiff.

(4) That at the time and place aforesaid he was the

driver of Thomas Welsh that his automobile be driven in a  
proper and careful manner and that he should be abated of  
the rights and safety of persons and property in, upon and  
at said intersection, and finally, that the automobile  
of Thomas Welsh was carelessly and negligently being driven,  
operated and managed and that Thomas Welsh deliberately  
crossed and against the traffic signal at said intersection  
and after colliding with the automobile of the plaintiff, his  
automobile caused in a carelessly negligent manner said  
intersection, as over the same in the path on the south side  
of said intersection, and upon, into and against a person, on  
said south side of said intersection.

(5) That as a result and the consequences of the collision  
aforesaid and as a direct and proximate result of the col-  
lision and negligent driving of Thomas Welsh and the colli-  
sion and impact of his automobile and the automobile of the  
plaintiff, the plaintiff was thereby greatly injured and was  
hospitalized and required surgical operations, for a long  
period of time during which he suffered great pain and was  
prevented from attending to his usual affairs and duties,  
and lost great pains and profits that he otherwise would  
have received, and has paid out large sums of money in and  
about endeavoring to be healed; and further, his automobile  
was greatly damaged and he was unable to use it for a long  
period of time and incurred large sums of money in repair



it fixed, for all of which plaintiff has not been compensated; all to his damage in the sum of \$15,000. Wherefore plaintiff brings this suit against Leo M. Sage, Administrator de bonis non of the Estate of Thomas Walsh, deceased."

Count two incorporates paragraphs 1, 2, 3 and 4 of count one, and further alleges:

"(5) That the said Thomas Walsh then and there carelessly and negligently drove, operated and managed the automobile he was driving upon and across said intersection at a high, dangerous and excessive rate of speed, greater than was reasonable and proper, having due regard for the traffic and use of way so as to endanger the life and limb of any person lawfully upon said intersection.

"(6) That said Thomas Walsh failed to stop his car upon entering said intersection, which showed a red light against traffic on his way, but carelessly and negligently drove his automobile through said red light, contrary to the provisions of the Motor Vehicle Law of Illinois.

"(7) That Thomas Walsh then and there failed to give the right of way to the plaintiff, although the latter's automobile was approaching said intersection on the right side of Thomas Walsh's automobile; which was contrary to the provisions of the Motor Vehicle Law of Illinois.

"(8) That said Thomas Walsh failed to sound his horn or give other warning signal of his approach, contrary to the provisions of the Motor Vehicle Law of Illinois.

"(9) That Thomas Walsh failed to keep a proper lookout for other vehicles upon or at said intersection, contrary to the provisions of the Motor Vehicle Law of Illinois.

"(10) That by reason of said negligence and said breaches of duty of said Thomas Walsh, or some one or more of them, or all of them concurring, his said automobile ran upon, against and collided with the plaintiff's automobile, with great force, and as a direct result of said negligence and breaches of duty,

[illegible]

the latter's automobile was greatly damaged, and plaintiff was thrown about, his body crushed and bruised, and he sustained the injuries and damages alleged in paragraph 5 of Count One, which are incorporated herein, in sum of \$15,000.

"Wherefore plaintiff sues herein said Administrator of Estate of Thomas Walsh, deceased, and asks judgment for \$15,000."

Upon the trial of the cause plaintiff offered evidence in support of his complaint. Defendant offered no evidence. In our view of this appeal it is unnecessary to detail the evidence offered by plaintiff as counsel for defendant upon the oral argument admitted that plaintiff's evidence made out a prima facie case and that the trial court ruled properly in denying defendant's motion for a directed verdict and in submitting the cause to the jury. In Morrison v. Flowers, 308 Ill. 189, 195, the court states: "A prima facie case is one which is apparently established by evidence adduced by the plaintiff in support of his case up to the time such evidence stands unexplained and uncontradicted. The words 'prima facie,' when used to describe evidence, ex vi termini imply that such evidence may be rebutted by competent testimony. (Meadowcroft v. People, 163 Ill. 56.) The term 'prima facie evidence' implies evidence which may be rebutted and overcome, (People v. McBride, 234 Ill. 146,) and simply means that in the absence of explanatory or contradictory evidence the finding shall be in accordance with the proof establishing the prima facie case."

A number of points are raised by plaintiff in support of his contention that the judgment should be reversed and the cause remanded for a new trial, but we deem it necessary to consider only one of the points urged. Plaintiff contends that the trial court committed reversible error in giving to the jury at the request of defendant the following instructions:

the latter's automobile was greatly damaged, and plaintiff was known about, his body crushed and broken, and he sustained the injuries and damages alleged in paragraph 7 of Count One, which are incorporated herein, in sum of \$15,000.

"Wherefore plaintiff asks herein said administrator of estate of Thomas, alias, deceased, and asks judgment for \$15,000.

Upon the trial of the cause plaintiff offered evidence in support of his complaint. Defendant offered no evidence. In our view of this appeal it is unnecessary to detail the evidence offered by plaintiff as counsel for defendant upon the trial arguments admitted that plaintiff's evidence made out a prima facie case and that the trial court ruled properly in denying defendant's motion for a directed verdict and in admitting the cause to the jury. In Forbes v. Thomas, 308 Ill. 189, 193, the court states: "A prima facie case is one which is apparently established by evidence adduced by the plaintiff in support of his case up to the time when evidence stands unexplained and uncontradicted. The words 'prima facie' when used to describe evidence, or to testify that such evidence may be rebutted by competent testimony." (Forbes v. Thomas, 308 Ill. 189, 193.) The term 'prima facie' evidence, though evidence which may be rebutted and overcome, (Forbes v. Thomas, 308 Ill. 189, 193) and simply means that in the absence of explanation or contradictory evidence the finding shall be in accordance with the proof establishing the prima facie case."

A number of points are raised by plaintiff in support of his contention that the judgment should be reversed and the cause remanded for a new trial, but we deem it necessary to consider only one of the points raised. Plaintiff contends that the trial court committed reversible error in giving to the jury at the request of defendant the following instructions:



"The jury are instructed that the plaintiff is required by law to prove his case by a preponderance of the evidence before he can recover. If the plaintiff in this suit has not so proven his case, or if the evidence is evenly balanced so that the jury are in doubt and unable to say on which side is the preponderance, or if the preponderance of the evidence is in favor of the defendant, then, in either of these cases, the verdict should be not guilty."

"The jury are instructed that the plaintiff cannot recover at all in this case against the defendant unless the jury believe that the plaintiff has proved, by a preponderance of the evidence, the following propositions.

"First, that the plaintiff was exercising ordinary care for his own safety at and just prior to the time of the accident in question.

"Second, that the defendant was guilty of negligence in the manner charged in the complaint.

"And third, that such negligence was the proximate, direct cause of the damage or injuries complained of by the plaintiff.

"And if you find, from the evidence, that the plaintiff has failed so to prove these propositions as stated, or that he has failed so to prove any one of them, he cannot recover against said defendant, and you should find the defendant not guilty."

"You are not permitted to assume that the plaintiff was exercising due and proper care for his own safety at and about the time of the accident, but the burden is on the plaintiff to prove such fact by a preponderance of the evidence, and if he has failed to make such proof as is required by these instructions, then your verdict should be in favor

of these cases, the verdict should be not guilty. If the evidence is in favor of the defendant, then, in either which side is the preponderance, or if the preponderance is balanced to that the jury has to find the verdict on the side which has not so proven his case, or if the evidence is against evidence before the jury. If the defendant is not admitted by law to prove his case by a preponderance of the "The jury are instructed that the defendant is re-

of the will now, the following possibilities:

For his own safety and that of the rest of the world, he must be kept in a secure place.

Second, that the defendant was guilty of a crime in the nature of a crime, in the sense of the law.

[illegible]

"And if you find, from the evidence, that the defendant has failed to prove those propositions as stated, or that he has failed to prove any one of them, we cannot recover against said defendant, and you should find the defendant not guilty."

"You are not permitted to assume that the Plaintiff was exercising due and proper care for his own safety at and about the time of the accident, and the burden is on the Plaintiff to prove such fact by a preponderance of the evidence, and if he has failed to make such proof as is required by these instructions, then your verdict should be in favor of the Defendant."



of the defendant."

These are stock instructions that are customarily and properly given in negligence cases where the defendant offers evidence bearing upon the merits of the case, but to give these instructions in the instant case, where the defendant offered no evidence, could only serve to confuse and mislead the jury, and the surprising verdict that was rendered was probably occasioned by these instructions. In Cohen v. City of Chicago, 197 Ill. App. 377, the court states (pp. 330, 381):

"Because the defendant put in no evidence, the jury were only to consider the case as made by the evidence of plaintiff. There was no occasion for the court to instruct the jury regarding the preponderance of the evidence, and certainly not to give the instruction refused, which told the jury that 'if the evidence was equally balanced, they must find for the defendant.' The jury were instructed that their verdict must rest upon a preponderance of the evidence and that if they found the defendant city guilty of the negligence charged against it in the declaration, their finding must be based upon a preponderance of the evidence. But as all the evidence before them was that of the plaintiff, the use of the word 'preponderance' in this condition of the record was unnecessary."

In Oakdale Bldg. Corp. v. Smithereen Co., 322 Ill. App. 222, we had before us a ~~xxxxxxxxxxxx~~ case where no evidence was offered by the defendant and the case went to the jury solely on the testimony adduced by plaintiff. The latter urged that the court erred in giving two instructions governing the quantum and burden of proof, and we cited and followed the ruling in Cohen v. City of Chicago, supra.

of Chicago, 194 T. C. No. 77, 100 F. 2d 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 91

: (E)

The Court in Gibson v. City of Chicago, 197 U.S. 472, 16 S.Ct. 801, 41 L.Ed. 1037, 22, has held that a defendant's testimony was admissible if it was offered by the defendant and the case went to the jury solely on the testimony of the witness. The latter urged that the court erred in giving the introduction regarding the charges and failure to prove, and as stated and following the ruling in Gibson v. City of Chicago, supra.

Defendant does not justify the giving of the three instructions but he claims that plaintiff has no right to complain of the error because a like error appeared in an instruction given at plaintiff's request. We have examined that instruction and find that it relates solely to the question of damages, and the point made by defendant is, therefore, without merit. We are convinced from a reading of the record that justice demands that this case be tried again.

The judgment of the Circuit court of Cook county is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE  
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

Reference was not made to the time  
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 reversed and the tower is to be to the tower.

THE TOWER WAS TO BE TO THE TOWER  
 REVERSED AND THE TOWER IS TO BE TO THE TOWER.

THE TOWER WAS TO BE TO THE TOWER, AND THE TOWER WAS TO BE TO THE TOWER.

44073

FRANK SLOWIK, Appellee,

v.

EDWIN A. LARSON and  
FRANCES LARSON, Appellants.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

3331.A.153

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action of forcible detainer brought by plaintiff against defendants for the possession of the second floor apartment in the building known as 5743 West Cornelia avenue, Chicago. The case was tried by the court without a jury and after evidence heard the court found defendants were guilty of unlawfully withholding from plaintiff the possession of the premises in question, that the right to the possession of the premises was in plaintiff, and ordered that a writ of restitution issue therefor and that plaintiff recover from defendants his costs. Defendants appeal.

Defendants contend, inter alia, that a demand for possession of the premises was an essential prerequisite before plaintiff could bring the instant proceeding; that plaintiff entirely failed to prove that he had made any such demand upon defendants before the suit was commenced, and that, therefore, the trial court lacked jurisdiction to enter the judgment. This contention is a meritorious one.

"We may premise by saying that the action of forcible entry and detainer, or forcible detainer, is a special statutory proceeding, summary in its nature and in derogation of the common law, and it follows that the conditions and requirements that the statute prescribes in conferring jurisdiction must clearly exist and that the mode of procedure provided by it must be strictly pursued. Steiner v. Priddy, 28 Ill. 179;





Schaumtoeffel v. Belm, 77 id. 567; French v. Willer, 126 id. 611; Burns v. Nash, 23 Ill. App. 552." (Fitzgerald v. Quinn, 165 Ill. 354, 360; see, also, Biebel Roofing Co. v. Pritchett, 373 Ill. 214, 215.)

It is also settled law that a demand in writing is an essential prerequisite before bringing an action of forcible detainer. (See Benjamin v. Allison, 201 Ill. App. 34, 36, 37, and Kramer v. Hessler, 291 Ill. App. 131, 134.) Plaintiff does not dispute the foregoing rules of law but he contended, in his brief, that defendants had waived the right to raise the question of failure on the part of plaintiff to make the statutory demand. Upon the oral argument this contention of plaintiff was considered fully, and his counsel was unable to sustain the contention as to waiver. The trial court, therefore, was without jurisdiction to enter the judgment in the instant case. Several other contentions raised by defendants need not be considered.

The judgment of the Municipal Court of Chicago is reversed and the cause is remanded for a new trial.

JUDGMENT REVERSED AND CAUSE  
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.



43903

JAMES S. BRADLEY,

Appellee, }

v. }

THOMAS M. MADDEN COMPANY,  
a corporation, }

Appellant. )

APPEAL FROM COUNTY COURT  
OF COOK COUNTY.

3381A. 153

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal defendant, Thomas M. Madden Company, seeks to reverse a judgment for \$1,115.19 rendered against it after a trial by the court without a jury in an action brought by plaintiff, James S. Bradley, to recover damages caused to his hearse by reason of the alleged negligence of the defendant.

There is no dispute or conflict as to the salient facts. Defendant's Ford pick-up truck, which was being driven by William Devereaux, one of its employees, collided with a hearse owned and driven by plaintiff shortly before noon on January 12, 1946. The collision occurred on Roosevelt road about two blocks west of the city limits of Chicago. Roosevelt road is a four-lane east and west highway about sixty feet wide. Its pavement was covered with glare ice or was icy in spots when the accident occurred. Bradley was driving his empty hearse in an easterly direction on the south half of Roosevelt road at a speed of 20 miles an hour and the right front fender of the hearse was about fifteen feet from the south curb. Devereaux was driving defendant's pick-up truck in a westerly direction on the north half of Roosevelt road at a speed of 20 miles per hour. Devereaux was driving with both hands on the steering wheel and with his foot on the accelerator and looking straight ahead, when, without any known cause, the



rear end of defendant's pick-up truck started to skid to the left or toward the south. Devereaux, in attempting to bring his vehicle out of the skid, turned his front wheels to the left. When that did not correct the skidding, he applied his brakes but the application of his brakes was not effective to stop the skidding. Bradley thought that the Ford pick-up truck was about twenty five feet east of his hearse when it started to skid. Devereaux thought that the vehicles were about seventy-five feet from each other when his pick-up truck started to skid. Defendant's truck continued to skid and collided with plaintiff's hearse on the south half of Roosevelt road. The right side of the truck struck the left front portion of the hearse. The pick-up truck was in good condition and Devereaux had 20 years experience driving automobiles. Bradley testified that he talked with Devereaux after the accident and was told by the latter that "he was driving carefully," that "he didn't know how in the world the accident had happened" and that "the best thing that he could guess was that one of his wheels hit a dry spot in the road and it swerved the car" over to the south half of the road into the path of the hearse.

Defendant contends that "the judgment of the trial court should be reversed" because "no negligence was proven on the part of defendant and therefore no recovery can be had."

Plaintiff's position, as stated in his brief, is that "whether defendant was negligent in operating his car at 20 miles per hour on ice and skidding over to the wrong side of the road and running into plaintiff, is a factual question to be determined by the jury and if no jury, then by the trial court."



rear end of defendant's truck which appeared to him to be  
 left or coming out again. Defendant, in attempting to bring  
 his vehicle out of the yard, saw that the truck was in the  
 left. When that was correct, he believed, he applied his  
 brakes but the application of his brakes was not sufficient to  
 stop the trucking. He then thought that the truck was  
 stuck and about twenty-five feet west of his house when it  
 started to shift. Defendant thought that the vehicle was  
 about twenty-five feet from where it was when it  
 began started to shift. Defendant's truck continued to shift  
 and collided with plaintiff's house on the north side of  
 Roosevelt road. The right side of the house across the left  
 front portion of the house. The right side was in good  
 condition and defendant had 20 years experience driving heavy  
 trucks. He testified that he did not know what the truck  
 after the accident and was told by the police that the truck  
 driving eastward, that the truck's front end in the yard the  
 defendant had happened" and that "the truck had been in the yard  
 since was that one of his trucks and it was in the yard  
 and it started the car" over to the north side of the road  
 into the back of the house.

Defendant submitted that the testimony of the trial  
 court should be reversed because the testimony was given  
 on the part of defendant and therefore no reversal was  
 had."

Plaintiff's position, as stated in his brief, is that  
 "whether defendant was negligent in operating his car is not  
 what was in issue on his and plaintiff's over to the north side of  
 the road and running into plaintiff, is a factual question  
 to be determined by the jury and if no jury, then by the  
 trial court."



The law applicable to the facts of this case is well settled and is clearly stated in Leonard v. Hey, 269 Mich. 491, 257 N.W. 733. In that case the court said at p. 734 of the last mentioned report:

"It is fundamental law that the driver of a car must keep on the right side of a street or highway, but failure to keep to the right when, through no fault of the driver, an automobile skids on a slippery pavement and is thus thrown across the road, has been held to excuse failure to comply with the statute (1 Comp. Laws 1929, sec. 4703; Chase v. Tingdale Bros., 127 Minn. 401 [149 N.W. 654]), but if such skidding results from the negligent acts or commissions of a driver, he is not absolved from the consequences of breach of the rule although it is not deliberate or intentional. Berry on Automobiles (4th Ed.), sec. 865. 'One cannot be held guilty of negligence in unconsciously failing to keep to the right of the highway, where that is impossible by reason of circumstances over which he has no control, and for which he is in no sense responsible.' 1 Blashfield, Cyclopedia of Automobile Law, p. 414."

The rule is stated as follows at p. 176, vol. 3-4, Huddy's Encyclopedia of Automobile Law, Ninth Edition:

"The failure of a driver of a motor vehicle to keep to the right side of the highway is excused where, without fault on his part, the machine skids across the center line of the road, but where skidding results from negligence, the driver is liable."

Plaintiff concedes that skidding on an icy pavement does not of itself constitute proof of negligence and that the presence of an automobile on the wrong side of the road because of its skidding on an icy pavement is excused, unless the skidding results from the negligence of its driver.

It will be noted that the only respect in which plaintiff claims that defendant's driver was negligent was in operating the pick-up truck at 20 miles an hour on the icy pavement. But plaintiff cannot be heard to say nor could the trial court properly find that defendant's driver was negligent in driving his truck at 20 miles per hour, since plaintiff himself was driving his hearse at the same speed on the same icy pavement. Therefore, there was no factual



question presented for the determination of the trial court as to whether defendant was negligent because its pick-up truck was being operated at a speed of 20 miles per hour before it skidded.

In denying defendant's motion to vacate the judgment entered herein, the trial judge made a rather lengthy statement, which is in part as follows:

"Now, then, I have looked at the record for some act of negligence, or at least from which we could infer negligence on the part of the defendant's operation of the car. It happens that in this case both cars were traveling at a speed of 20 miles per hour. Now, 20 miles per hour might be unreasonable, or a speed that a prudent person, taking in all the circumstances that were in force at that time, - it might be an unreasonable rate of speed, considering the condition of the road.

"Your argument to that might be, - so was the plaintiff's car.

\* \* \*

"Well, there may be some difficulty trying to point out a specific act of negligence on the part of the defendant in this case, other than the fact that the defendant did, in my opinion, get himself into a position where he could not prevent an accident, through his own personal operation of the car. It is up to him to keep his car over on the right-hand side of the road. If the pavement is in such condition that he cannot operate his car without doing that, maybe he is using bad judgment in even being on the road."

It seems to us from the foregoing statement that the trial judge did not predicate his finding that defendant was

question presented for the decision of the trial court  
as to whether defendant was negligent because the pickup truck  
was being operated at a speed of 40 miles an hour whereas  
it should be.

In denying defendant's motion to set aside the verdict  
entered therein, the trial judge made a finding of fact, to-wit:  
that, which is in part as follows:

Now, then, I have found as the facts that the driver  
of negligence, or at least that there was some fault  
guilty on the part of the defendant's operation of the car.  
It appears that in this case both cars were traveling at a  
speed of 40 miles an hour. Now, although the law might  
be unreasonable, as a result of a speed of 40 miles an hour,  
in all the circumstances that were in force at that time,  
it should be an unreasonable rate of speed, considering the  
condition of the road.

"The court is of the opinion that the driver of the  
pickup car.

"Well, there may be some difficulty in finding  
out a specific act of negligence on the part of the defendant  
and in this case, other than the fact that the defendant  
was, in my opinion, not driving at a reasonable speed.  
The court found as a fact, however, that the defendant  
operated the car. It is up to him to show that he was over  
on the right-hand side of the road. If the payment is in  
such condition that he cannot control the car, it is not his  
fault, maybe he is a little bit negligent in even being on the  
road."

It seems to me from the foregoing statement that the  
trial judge did not predicate his finding that defendant was



negligent on the fact that its truck was being driven at a speed of 20 miles per hour. It appears rather that he concluded that Devereaux possibly should not have driven the truck at all on Roosevelt road because of its slippery condition and that defendant was guilty of negligence merely because its truck skidded over the center line and onto the south side of the road, since "it is up to him to keep his car over on the right-hand side of the road." This is tantamount to saying that defendant's driver, Devereaux, was under the absolute duty to keep his truck on the north half of the road, regardless of whether its skidding over to the south side of the road was without fault on his part. The trial court's finding in this regard was clearly contrary to law. Defendant had the same right to have its truck operated on Roosevelt road at the time and place in question and under the then existing conditions as plaintiff had to operate his hearse. Neither vehicle was being driven in violation of law in respect to the speed at which it was traveling. If plaintiff had the right to assume that it was reasonably safe to drive his hearse at a speed of 20 miles per hour on the icy pavement, Devereaux had the right to assume that it was reasonably safe to drive defendant's truck at the same speed on the same pavement.

In the absence of any evidence of facts or circumstances that tend to show that defendant's driver was guilty of any negligence that caused the truck to skid, we are impelled to hold that the damage to plaintiff's hearse resulted from an unavoidable accident.

The judgment of the County court of Cook county is reversed and the cause is remanded with directions to enter judgment in favor of defendant and against plaintiff.

JUDGMENT REVERSED AND CAUSE REMANDED  
WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

The judgment of the County Court at St. Louis is affirmed from an unavailing attempt.

It is held that the issue for judgment is the negligence of the driver of the car which was struck by the car of the defendant, and not the negligence of the driver of the car which was struck by the car of the defendant.

In the absence of any evidence as to the negligence of the driver of the car which was struck by the car of the defendant, the issue for judgment is the negligence of the driver of the car which was struck by the car of the defendant.

It is held that the issue for judgment is the negligence of the driver of the car which was struck by the car of the defendant, and not the negligence of the driver of the car which was struck by the car of the defendant.

The judgment of the County Court at St. Louis is affirmed from an unavailing attempt.

reversed and the case is argued in favor of defendant.



43937

333 LA 154

THEODORE KARAVIDAS,  
Appellant,

v.

EDWARD O'DWYER,  
Appellee.

} APPEAL FROM MUNICIPAL  
} COURT OF CHICAGO. 70

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Theodore Karavidas, brought an action of forcible detainer against the defendant, Edward O'Dwyer, claiming that the latter unlawfully withheld the possession of "certain store premises at 608-10 South Racine Avenue" in Chicago. After a trial by the court without a jury a finding was entered that the defendant was "Not Guilty" and judgment was entered on July 17, 1946 on such finding in favor of defendant and against plaintiff. A notice of appeal from the judgment was filed by plaintiff on July 23, 1946.

Defendant filed a motion in this court, which was reserved to hearing, to dismiss this appeal because plaintiff did not perfect same in accordance with the jurisdictional provisions of the Forcible Entry and Detainer Act (chap. 57, Ill. Rev. Stat. 1945).

Section 18 (par. 19) of said act provides in part as follows:

"If any party shall feel aggrieved by the verdict of the jury or decision of the court, upon any trial had under this Act, such party may have an appeal, to be taken to the same courts, in the same manner, and tried in the same way as appeals are taken and tried in other cases. Provided such party files notice of appeal and bond within five (5) days from the rendition of the judgment, and no writ of restitution shall be issued in any cases until the expiration of said five (5) days."

Section 19 (par. 20) defines the condition of the appeal bond required to be filed by a defendant against whom a judgment is rendered in an action of forcible



detainer.

Section 20 (par. 21) provides as follows:

"If the plaintiff appeals, the condition of the bond shall be as in other cases of appeal, when taken by the plaintiff, except as otherwise provided by law."

It will be noted that plaintiff was entitled to an appeal under section 18 of said Act only if he filed his notice of appeal and bond within five days from the entry of the judgment. As has been seen, the judgment was entered July 17, 1946 and the notice of appeal was not filed until July 23, 1946, which was more than five days after the entry of the judgment. Plaintiff not only did not file an appeal bond within five days after the entry of the judgment, as required by the statute, but he has not filed an appeal bond at all.

The method of review prescribed in the statute is exclusive and must be followed in order to perfect an appeal. In Dood and Edmunds, Appellate Court Procedure, it is said in section 368 (p.283): "As the action of forcible entry and detainer is a special statutory proceeding, summary in its nature and in derogation of the common law, the jurisdiction of courts in regard thereto is limited by statute \* \* \* and the right of appeal can be availed of only by following the statutory procedure."

The foregoing provisions of the Forcible Entry and Detainer Act pertaining to appeals from judgments rendered under said Act are equally applicable to plaintiffs and defendants. Sections 18, 19 and 20 must be construed together. As has been shown, section 19 defines the condition of the appeal bond that must be filed by a defendant against whom a judgment has been entered in an action of forcible detainer and section 20 specifies the nature of the appeal



bond that must be filed by a plaintiff against whom a judgment has been rendered in such an action. In Armson v. Forsyth, 40 Ill. 49, which was an appeal by the plaintiff in the court below from a judgment in an action of forcible entry and detainer, the appellee moved to dismiss the appeal, because the bond was not signed by the plaintiff. In dismissing the appeal in that case, the court held: "It is essential to the sufficiency of the appeal bond that it should be executed by the plaintiff. It will not suffice that it be executed by the landlord of the plaintiff, although the suit was in reference to the possession of premises which the plaintiff claimed the right to hold as tenant of the party executing the bond." In the Armson case the court recognized the necessity of plaintiff filing a sufficient appeal bond in order to perfect an appeal from a judgment rendered in an action of forcible detainer.

Since plaintiff did not file his notice of appeal and bond within five days after the rendition of the judgment, this appeal must be dismissed.

APPEAL DISMISSED.

Friend, P. J., and Scanlan, J., concur.



that must be filed in a complaint against them a [unclear]

and has been returned in such an action. It should be

Forfeited, to III, 12, which was a copy of the [unclear]

in the court below from a [unclear] in an action at [unclear]

entry and detention, the [unclear] was to [unclear] the [unclear]

because the [unclear] was not signed by the [unclear]. On the

dismissing the appeal in that case, the [unclear] said it

referred to the [unclear] of the [unclear] (see 12)

should be [unclear] by the [unclear]. It is [unclear] that

that it be [unclear] by the [unclear] of the [unclear], [unclear]

the [unclear] was in [unclear] in the [unclear] of [unclear] [unclear]

the [unclear] [unclear] and that it was [unclear] of the [unclear]

executing the [unclear]. In the [unclear] [unclear] [unclear]

the necessity of [unclear] [unclear] [unclear] [unclear]

in order to [unclear] [unclear] [unclear] [unclear] [unclear]

in action of [unclear] [unclear]

since [unclear] [unclear] [unclear] [unclear] [unclear] [unclear]

from which [unclear] [unclear] [unclear] [unclear] [unclear]

this [unclear] [unclear] [unclear]

[unclear] [unclear] [unclear]

[unclear] [unclear] [unclear]

Principles, 12, 13, and [unclear] 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100



43946

HELENE DUDLEY,  
Appellant,

v.

DARWIN C. DUDLEY,  
Appellee.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

3381A.154

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal plaintiff, Helene Dudley, seeks to reverse a decretal order of the trial court which dismissed her complaint for divorce for "lack of jurisdiction."

On April 16, 1946 plaintiff filed a verified complaint for divorce in which she alleged inter alia:

"That for more than one year prior to the filing of this Bill of Complaint for divorce she has been and still is a resident of the City of Chicago, County of Cook and State of Illinois and that the defendant, Darwin C. Dudley, has been a resident of the City of Chicago, County of Cook and State of Illinois until the time he entered into the military service and since that time has been situated in various places in the United States. The said defendant is at the present time domiciling in Boca Ratone, Palm Beach County, Florida."

Included in the relief sought in plaintiff's complaint was the care and custody of the three minor children of the parties and a reasonable allowance for alimony and the support and maintenance of the children.

On June 4, 1946 the defendant, Darwin C. Dudley, filed a verified answer in which he raised as a factual issue the question of the court's jurisdiction of the subject matter on the ground that plaintiff had not resided in the State of Illinois for more than one year immediately preceding the filing of her complaint. The allegations of

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statement for the first of our results. The significance of

the answer in this regard are as follows:

"He denies that the plaintiff, Helene Dudley, was a resident of the City of Chicago, County of Cook and State of Illinois for more than one year prior to the filing of her Complaint, as alleged in Paragraph 1 of said Complaint, but, on the contrary this defendant represents and states the fact to be that the plaintiff has been a resident of the town of Boca Raton, in the State of Florida, since September, 1944, and that she lived there continually from September, 1944, until March 23, 1946."

Defendant's answer then proceeded to deny the facts alleged in the complaint upon which plaintiff predicated her charge that he was guilty of adultery and cruelty.

On June 17, 1946 the following order was entered after due notice to defendant's counsel:

"On Motion of Attorney for the plaintiff Helene Dudley, this matter coming on to be heard pursuant to due and timely notice, the Court having heard the argument of counsel, it is ordered that \* \* \* the above cause be dismissed without costs, it appearing to the Court that all costs have been paid."

On July 16, 1946 plaintiff filed a motion, after due notice to defendant's attorney, to vacate said order of dismissal and reinstate the case.

On July 24, 1946 the trial court entered the following order:

"On motion of attorney for plaintiff to vacate the order of dismissal heretofore entered herein and to re-instate the cause supported by affidavit of plaintiff, due notice served the Court hearing testimony of Plaintiff, and defendant represented by counsel,

"IT IS HEREBY ORDERED that the motion of Plaintiff to vacate prior order of dismissal of June 17, 1946, and re-instate the cause be sustained, and is hereby sustained and the cause re-instated on the calendar of the Court."

On July 30, 1946 plaintiff filed a verified petition for an allowance for temporary alimony and for the care and

the answer is that the

THE UNIVERSITY OF CHICAGO PRESS

resident of the City of Chicago, County of Cook and State  
of Illinois for more than one year prior to the filing of  
her Complaint, as alleged in paragraph I of said Complaint,  
but, on the contrary this defendant never resided and does  
the fact to be that the plaintiff was born a resident of the  
town of Wood Haven, in the State of Texas, about September,  
1944, and that she lived there until her death.

"Call" "Note" "Liter." "Age"

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perceive the "policy" of "what's in it for me."

THE NOTICE OF DEFENDANT'S COUNSEL:

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On 10/10/1941, the following information was received from the Bureau of the Census, Washington, D. C.:

1990 年 10 月

1. The Commission of the European Communities (CEC) has been established to coordinate the activities of the member states in the field of economic and social policy. The Commission is composed of representatives of the member states and the European Parliament. The Commission's main task is to ensure the implementation of the Treaty of Rome and to coordinate the activities of the member states in the field of economic and social policy. The Commission is also responsible for the management of the European Community's budget and for the implementation of the European Community's policies in the field of economic and social policy.

and the case reported on the 11th of the month.  
re-instate the same to suit me, and it being understood  
to vacate prior to the 1st of June, 1904, and  
"IT IS HEREBY ORDERED that the motion be granted."

CC 171730, 1940. (1940)

for an allowance for property depreciation and for the cost of



support of the minor children. When plaintiff's petition for temporary alimony came on for hearing on July 30, 1946, both parties being represented by attorneys, the trial court, having heard arguments of counsel, entered an order that "defendant make answer to plaintiff's petition by August 21, 1946" and that a hearing be had "on plaintiff's petition and defendant's answer thereto" on August 28, 1946.

On August 20, 1946 defendant filed a verified answer to plaintiff's petition for temporary alimony, which contained substantially the same allegations as did his answer to the complaint in support of his claim that the court had no jurisdiction of the subject matter, because plaintiff had not resided in the State of Illinois for more than one year immediately preceding the filing of her complaint. Defendant's answer to plaintiff's petition further alleged that plaintiff had no right to an allowance either for alimony or for the care and support of the minor children and that he was not financially able to pay any such allowance.

On August 28, 1946, after a hearing on plaintiff's foregoing petition for temporary alimony and defendant's answer to said petition, defendant's counsel being present and plaintiff having testified at said hearing, an order was entered that "defendant pay to plaintiff the sum of One Hundred Dollars \* \* \* weekly for support and maintenance of plaintiff and three children of the parties, first payment to be made Tuesday, September 3rd, 1946."

On September 4, 1946 defendant presented a motion for leave to withdraw his answer to plaintiff's complaint and to file a motion to strike said complaint for want of jurisdiction on the following grounds:

- "1. The plaintiff did not reside in the State of

"1. The Plaintiff did not reside in the State of

Illinois on the following grounds:

to file a motion to require the Plaintiff to appear in person  
to answer the Plaintiff's complaint and

on September 4, 1962 defendant presented a motion for

to be made binding, September 10, 1962.

Plaintiff and cross defendant of the Plaintiff, their present  
residence is at 1111 North Dearborn Street, Chicago, Illinois.

was entered that defendant pay to Plaintiff the sum of the  
and Plaintiff having possession of the same, to the

answer to said motion, defendant's motion was denied.

Plaintiff's motion for temporary custody was denied.

On August 22, 1962, the Plaintiff's

this to pay the same.

support of the above motion and to file a motion for  
rights to an attorney at law for Plaintiff for the same.

to Plaintiff's motion for custody of the child and to  
July, 1962, the Plaintiff's motion for custody of the child

aided in the State of Illinois and was not paid for  
motion of the Plaintiff, defendant's motion was denied.

motion of the Plaintiff, defendant's motion was denied  
compliance in support of the Plaintiff's motion and no

substantially the same situation as the Plaintiff's motion  
Plaintiff's motion for temporary custody, which was denied.

On August 22, 1962 defendant filed a motion for

motion for custody of the child, September 10, 1962.

that a hearing be had on Plaintiff's motion and defendant's  
motion for custody of the child, September 10, 1962.

and motion for custody of the child, September 10, 1962.

heard evidence of counsel, and on September 10, 1962, the

motion for custody of the child, September 10, 1962, was

support of the motion for custody of the child, September 10,



Illinois for one whole year next before the filing of her Complaint for Divorce.

"2. Neither the plaintiff nor the defendant resided in the State of Illinois at any time subsequent to their marriage.

"3. The court lacks jurisdiction of the subject matter of plaintiff's suit."

On the same day, September 4, 1946, an order was entered granting defendant's motion to withdraw his answer to plaintiff's complaint and to file his motion to strike same and hearing on the motion to strike was set for September 13, 1946. On September 13, 1946 plaintiff filed a motion to strike the motion of defendant to strike the complaint. Also on the same day defendant filed an amended motion to strike the complaint, which motion set forth the three grounds included in his original motion to strike and the following additional ground:

"The Court lacked jurisdiction to grant the plaintiff leave to reinstate the above entitled cause, when plaintiff had voluntarily dismissed the same, and the order of July 21, 1946, reinstating the said cause, is void."

Plaintiff filed a motion supported by several affidavits opposing defendant's motion to strike her complaint.

On September 17, 1946 the trial court entered the following order:

"This cause coming on to be heard upon the motion of the attorney for the defendant to strike the Complaint of the plaintiff herein for lack of jurisdiction, and the Court having heard the arguments of counsel and being fully advised in the premises.

"IT IS ORDERED, ADJUDGED AND DECREED by the Court that the said Complaint of the plaintiff be, and the same is, hereby dismissed for lack of jurisdiction."

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1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 2632, 2633, 2634, 2635, 2636, 2637, 2638, 2639, 2640, 2641, 2642, 2643, 2644, 2645, 2646, 2647, 2648, 2649, 2650, 2651, 2652, 2653, 2654, 2655, 2656, 2657, 2658, 2659, 2660, 2661, 2662, 2663, 2664, 2665, 2666, 2667, 2668, 2669, 2670, 2671, 2672, 2673, 2674, 2675, 2676, 2677, 2678, 26

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This is the order appealed from and the record discloses that it was entered on the sole ground that, plaintiff having voluntarily dismissed her case, the court had no power to set aside the order of dismissal and to reinstate the cause.

Plaintiff contends that "by knowingly participating in the proceedings after vacation of plaintiff's voluntary dismissal by appearing and pleading and creating other issues, the defendant forfeited whatever right he may have had to question the validity of the order of reinstatement."

In Weisguth v. Supreme Tribe of Ben Hur, 272 Ill. 541, the court said at p. 543:

"In case of a voluntary non-suit upon motion of a plaintiff the court has no power to set aside the order of dismissal and re-instate the cause unless at the time the non-suit is taken leave is given the plaintiff to move to set it aside. (Barnes v. Barber, 1 Gilm. 401; Lombard v. Cheever, 3 id. 469.) The reason for this rule is apparent. If a plaintiff by his deliberate and voluntary act secures the dismissal of his suit he must be held to have anticipated the effect and necessary results of this action and should not be restored to the position and the rights which he voluntarily abandoned. Having taken a non-suit, his only recourse is to begin his action anew. Plaintiff in error, however, has forfeited its right to complain of this action of the court. After the cause was re-instated it [defendant] appeared in two trials in the city court and contested the case on the merits. By so doing it conferred upon the court the power to proceed and waived its right to object to the re-instatement of the cause. (Herrington v. McCollum, 73 Ill. 476; Grand Pacific Hotel Co. v. Pinkerton, 217 id. 61.)"

Since the order of dismissal entered herein contained no reservation granting plaintiff leave to move to set it aside, it must be held that the trial court had no jurisdiction to reinstate the case. The question is then presented as to whether defendant waived his right to object to its reinstatement by appearing and participating in the proceedings hereinbefore referred to, after it was reinstated.

While it is true that the waiver rule was applied

This is the same principle that is applied in the case of the other two. It is not necessary to show that the other two are not the same as the first one. It is only necessary to show that the other two are not the same as the first one.

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in the Weisguth case, because after that case was reinstated defendant appeared and contested the case on the merits, we think that the waiver rule applies with equal force here, since, after this case was reinstated, defendant appeared and contested plaintiff's petition for temporary alimony on the merits by filing an answer thereto. Defendant also appeared by his attorney at the hearing on said petition and answer and the record fails to show that he limited his appearance or made any protest as to the court's jurisdiction over his person.

In our opinion, defendant, by participating under a general appearance in said proceeding in the manner indicated, after the case was reinstated, waived his right to object to its reinstatement.

It is stated in defendant's brief that "the fact that the defendant filed a verified answer to plaintiff's petition for alimony, in which answer the defendant challenged the jurisdiction of the court to pass upon the question of alimony, did not waive defendant's rights to question the order reinstating the case." This statement is somewhat misleading, because, while defendant in his answer to plaintiff's petition for alimony did substantially repeat the allegations of his answer to plaintiff's complaint, upon which he predicated his challenge of the court's jurisdiction of the subject matter, his answer to the petition for alimony also alleged the matters heretofore set forth, which contested said petition on the merits.

Defendant's answer to plaintiff's petition for alimony did not challenge the court's jurisdiction on the ground that it had no power to reinstate the case but on the ground that plaintiff had not resided in the State of Illinois for more

in the English case, because after that was established  
defendant appeared and contested the case on the merits, we  
think that the answer will require that some issue be  
stated, after this case was rejected, defendant's answer  
and contested plaintiff's motion for summary judgment on  
the merits by filing an answer. Defendant also  
submitted by his attorney, if the basis of his motion  
was answer and the record fails to show that he limited the  
scope of his motion as to the merits, defendant's  
answer is over his answer.

In any event, defendant, in his answer, stated  
general grounds for his motion in the summary judgment,  
after the case was rejected, and he is entitled to  
its rehearing.

It is stated in defendant's answer that the facts  
are stated that a verified answer to plaintiff's motion  
for summary judgment, in which answer the grounds were stated  
for summary judgment on the merits to be the question of all-  
sufficiency of the facts to justify the grant of summary  
judgment, did not waive defendant's right to present the facts  
in answer to the case. This statement is somewhat un-  
clear, because, while defendant in his answer to plaintiff's  
petition for summary judgment substantially repeats the allegations  
of his answer to plaintiff's complaint, some facts in plaintiff's  
answer are outside of the court's jurisdiction of the subject  
matter, the answer to the petition for summary judgment is limited  
to the matters before the court, which included only the  
facts on the merits.

Defendant's answer to plaintiff's petition for summary  
judgment challenges the court's jurisdiction on the ground that  
it has no power to rehear the case but on the ground that  
plaintiff has not verified in the facts of Illinois for summary



than one year immediately preceding the filing of her complaint. Defendant's challenge of the court's jurisdiction because of plaintiff's alleged non-residence presented an issue of fact which has not yet been determined. That issue is not in anywise related to the question as to the court's lack of jurisdiction to reinstate the case after its voluntary dismissal.

Defendant, having waived his right to object to the reinstatement of the case and having failed on the hearing on plaintiff's petition for alimony to procure a determination by the chancellor of the issue of fact relative to the court's jurisdiction of the subject matter, may still have that issue determined upon the trial of this case on the complaint and answer.

Plaintiff also contends that "an order of voluntary dismissal may be vacated during the term in accordance with power conferred by statute and the inherent power of the court to set aside its orders and judgments." Since the Weisguth case clearly announces the law governing a situation such as is presented here, it must be held that there is no merit in this contention.

We reserved to hearing a motion heretofore made by plaintiff to strike the additional record and additional abstract filed by defendant and also that portion of defendant's brief which refers to the additional abstract. Inasmuch as the matters contained in the additional record and the additional abstract have no bearing on any question presented on this appeal, said motion is allowed.

For the reasons stated herein the decretal order of the Superior court of Cook county is reversed and the cause

There are two immediately apparent difficulties of the new  
first, the somewhat arbitrary way in which the distribution  
because of the fact that the new distribution is  
first of all a new way of looking at the world  
is not the same as the old way of looking at the world  
and of course it is not the same as the old way of  
looking at the world.

transmitted on this channel. This action is allowed  
the additional signals have no bearing on any decision  
such as the matter contained in the additional report and  
and's report which refers to the additional statement. The  
additional filed by Government and also that portion of the  
agreement to which the additional report was additional  
is referred to in the report and also that portion of the

the auditor's report of 1934, however, it is revealed that the same

~~-8-~~

is remanded with directions to permit defendant to refile his answer to the complaint and to try the issues of fact, jurisdictional and otherwise, joined on the complaint and answer.

REVERSED AND REMANDED  
WITH DIRECTIONS.

Friend, P. J., and Scanlan, J., concur.

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44180

JOE EDWARD BELSKY,

Appellee,

v.

WALTER P. KORNAK,

Appellant.

)  
)  
) APPEAL FROM SUPERIOR  
) COURT, COOK COUNTY.

) 3331.A. 155

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

Plaintiff, Joe Edward Belsky, brought an action in forcible detainer and for damages against defendant, Walter P. Kornak, before a justice of the peace. After a hearing the justice of the peace entered judgment in favor of plaintiff and against defendant for possession of two stalls in a garage and \$45 damages. Defendant appealed from said judgment by filing an appeal bond in the office of the clerk of the Superior court of Cook county, which bond was duly approved by said clerk, who thereupon issued a writ of supersedeas directed to the justice of the peace and a summons to plaintiff. The writ of supersedeas was served upon the justice of the peace and the summons was served upon plaintiff. Plaintiff filed his appearance in the Superior court. When the justice of the peace failed to file the transcript of his docket in the Superior court within the time required by statute, plaintiff presented a written motion "that this cause be dismissed for failure to file the transcript of the docket of the Justice of the Peace within the time allowed." The trial court entered an order sustaining plaintiff's motion and dismissed the appeal. The instant appeal is prosecuted by defendant to reverse said order. Plaintiff filed no brief in this court.

Defendant's theory, as stated in his brief, is that

JOE HENRY HENRY,

Defendant,

v.

WALTER F. HENRY,

Plaintiff.

MR. JUSTICE BRIDGES delivered the opinion of the court.

Plaintiff, Joe Henry Henry, moved to compel in

discovery of defendant and for judgment, order  
of discovery, before a question of the order, after a hearing.

The facts of the case are as follows: Plaintiff

defendant and plaintiff defendant Joe Henry Henry

reside in a house, and his name is Henry Henry.

From said plaintiff it is alleged that defendant

of the date of the discovery of the house, which

house was only occupied by said house, and defendant

a suit of discovery, directed to the location of the house

was a demand for plaintiff, the suit of discovery was

brought upon the location of the house and the plaintiff

moved upon plaintiff, plaintiff filed his answer in

the superior court, and the location of the house was

to the the plaintiff in the house in the house

within the time required in the house, which

within the time this case be brought or return in

the the plaintiff of the house at the location of the house

within the time allowed." The trial court ordered an order

establishing plaintiff's motion and dismissed the appeal. The

instant appeal is prosecuted by defendant to reverse this

order. Plaintiff filed his brief in this court.

Defendant's theory, as stated in his brief, is that



"where an appeal from a justice of the peace is perfected by the filing of a bond with the Clerk of the Superior Court of Cook County and a supersedeas is issued directed to the justice of the peace it is the duty of the justice of the peace to file the transcript of the docket within the time provided by statute, but that the failure of the justice of the peace to file transcript of the docket within the time provided by the statute is not ground for a dismissal of the appeal."

Plaintiff's theory, which was apparently adopted by the trial judge, seems to have been that it was the duty of the defendant to file the transcript of the docket of the justice of the peace within the time provided by statute and that the failure of defendant to perform such duty compelled the dismissal of his appeal.

The trial court clearly erred in entering the order appealed from. All that defendant was required to do to perfect his appeal from the justice of the peace was to file his appeal bond and have same approved by the clerk of the Superior court. He did that. The clerk of said court then performed his duty by issuing a writ of supersedeas directed to the justice of the peace, upon whom the writ was properly served. The Justices and Constables Act (chap. 79, par. 116, sec. 1, Ill. Rev. Stat. 1945) contains the following provisions:

"If the [appeal] bond is filed with the clerk of the court to which the appeal is taken, it shall be approved by him, and upon the approval of the bond, the clerk shall issue a supersedeas enjoining the justice \* \* \* from proceeding any further in said suit, and suspending all proceedings in relation thereto \* \* \*. The justice shall, within twenty days after \* \* \* the service upon him of the supersedeas, deliver to the clerk of the court to which the appeal is taken, all the papers in the case and a transcript of his docket in the case with a certificate under his hand that said transcript and papers contain a full and perfect statement of all the proceedings before him."

It is clear that the foregoing provisions of the statute

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See, I, III, Vol. 1947, Cont. 200, p. 1.

proceeding before him."

It is clear that the foregoing provisions of the statute

made it the exclusive duty of the justice of the peace to deliver the transcript of his docket with the required certificate to the clerk of the Superior court and his failure to perform that duty cannot be charged to defendant.

In Haller v. Rieth, 223 Ill. App. 27, the County court of Madison county dismissed an appeal from a justice of the peace on the ground that the transcript of the proceedings before the justice of the peace was not on file in said County court within the 20 days provided by statute. There the court said at pp. 29 and 30:

"The record in this case discloses that appellant filed said appeal bond with said clerk of the county court of Madison county within the twenty days as by law required and that said clerk approved said bond and on the same day issued a superseas and the same was served upon said justice on September 18, 1920. When appellant filed his appeal bond with the clerk of the county court and same was approved by him, appellant had done all that was required of him by statute to perfect his appeal, although the papers were not sent up within the time specified by statute. Little v. Smith, 5 Ill. 400; Gallimore v. Dazey, 12 Ill. 143-145; Frahm v. Craig Drain, Dist. Com'rs, 200 Ill. 233-235; Natenberg v. Solak, 174 Ill. App. 443-445."

The aforesaid section of the statute also provides that the appeal bond may be filed with and approved by the justice of the peace from whose judgment the appeal is prosecuted and that when the appeal bond has been so filed and approved, the justice of the peace shall within 20 days thereafter file it in the office of the clerk of the court to which the appeal is taken.

In Little v. Smith, 5 Ill. (4 Scam.) 400, an appeal was dismissed by the Circuit court of Randolph county because the justice of the peace had not filed the appeal bond with the clerk of said Circuit court within 20 days after his approval and acceptance of it. In reversing the Circuit court in that case the Supreme court said at p. 402:



"When the party appealing has entered into the appeal bond, and the same is accepted and approved by the justice, the appeal is taken. He had done all which the law requires of him, and what remains to be done, to wit: the return of the papers to the office of the clerk, is to be performed by the justice of the peace. In the performance of this act, which is merely ministerial, the justice is the officer of the law, and not the agent of the party; and consequently the party cannot be held responsible for his neglect. We cannot but think it would be attended with hardship to take from a party the power of performing an act and then dismiss his appeal because the act was not performed."

For the reasons stated herein the order of the Superior court of Cook county is reversed.

ORDER REVERSED.

Friend, P. J., and Scanlan, J., concur.







44293

DR. O. A. RAWLINS,  
Appellee,

v.

ANNA R. BOGUSIEWICZ and  
STANLEY BOGUSIEWICZ,  
Appellants.

41  
3321A-135  
)  
)  
) APPEAL FROM CIRCUIT  
)  
) COURT, COOK COUNTY.  
)  
)

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal defendants, Anna R. Bogusiewicz and Stanley Bogusiewicz, seek to reverse a decree entered September 20, 1946, which denied their petition to vacate a decree entered December 3, 1945 in favor of plaintiff, Dr. O. A. Rawlins.

Plaintiff filed his complaint for the specific performance of a written contract executed November 15, 1943, under the terms of which he agreed to exchange a farm owned by him near Portage, Wisconsin, together with certain personal property used in connection with said farm, for real estate at 1328 West Division street, Chicago, Illinois, owned by defendants.

A decree was entered December 3, 1945, which adjudged that the written contract between the parties be specifically performed. Defendants did not appeal from this decree but filed a verified petition on December 20, 1945 asking that it be vacated. Said petition and plaintiff's answer thereto were referred to a master in chancery for hearing. The master made the following report:

"A decree of specific performance was entered in this cause on December 3, 1945, which provided that plaintiff execute and deliver to defendants a proper and sufficient conveyance in fee of the premises described in said decree and that defendants, upon the tender or delivery to them of such

Dr. C. A. Rawlin,  
 Plaintiff,  
 v.  
 Anna R. Dornstien and  
 Stanley Dornstien,  
 Defendants.

AND JUSTICE SULLIVAN rendered the opinion of the court.

By this special defendant, Anna R. Dornstien and Stanley Dornstien, seek to remove a certain parcel of land, entered 20, 1946, which denied their petition to vacate a decree entered December 3, 1945 in favor of plaintiff, Dr. C. A. Rawlin.

Plaintiff filed his complaint for the specific performance of a written contract entered November 1, 1945, under the terms of which he agreed to sell to defendant by his near father, defendant, together with certain parcel of land, property used in connection with said land, for real estate at 1335 West Division Street, Chicago, Illinois, owned by defendant.

A decree was entered December 3, 1945, which affirmed that the written contract between the parties be specifically performed. Defendant did not appear for this decree but filed a verified petition on January 27, 1946, asking that it be vacated. This petition and plaintiff's answer thereto were referred to a master in equity for hearing. The master made the following report:

"A decree of specific performance was entered in this cause on December 3, 1945, which provided that plaintiff execute and deliver to defendant a proper and authentic conveyance in fee of the premises described in said decree and that defendant, upon the tender of delivery to him of such

conveyance together with the bill of sale of the personal property in said contract described, do execute and deliver to the plaintiff a deed to certain premises also described in said decree.

"Defendants filed a petition on December 20, 1945 alleging that since the entry of said decree they have discovered that one Charles A. Dupee, acting as agent for plaintiff, had sold and delivered a certain tractor described in said contract and decree, and that plaintiff had removed from the farm in question numerous other items of personal property required by said contract and decree to be delivered to defendants; that in so doing, plaintiff has put it out of his power to comply with the terms of the decree with reference to the delivery of said personal property. The petition alleges that the said articles of personal property are necessary to the use and operation of the premises and that the inclusion of the same in the contract was one of the inducing causes which impelled defendants to sign said contract; that it would be inequitable to compel defendants to accept a conveyance of the premises without receipt by them of the above mentioned personal property. The petition prays that the decree be vacated and the complaint be dismissed.

"Plaintiff's answer denies that the said Charles A. Dupee acted as agent for plaintiff in selling the tractor referred to in the petition and alleges that he acted on his own initiative without advice, consent or authority from the plaintiff.

"Plaintiff admits that the other items of personal property referred to in said petition were removed from the farm in question, but alleges that the same were removed

"I have been advised that the above named person is not a member of the Communist Party of the United States of America."

and stored elsewhere for safe-keeping, in the fear that they might be stolen from the farm while it remained unoccupied. Plaintiff alleges that he has repossessed himself of said tractor and has it and all the rest of the personal property in said contract mentioned, ready for delivery to defendants, pursuant to the terms of the contract and decree of this court.

"From the evidence, both oral and documentary, the master finds as follows:

\* \* \*

"That on or about March 22, 1945, one Charles A. Dupee, who was formerly tenant in possession of the farm involved in these proceedings, sold and delivered the Montgomery-Ward 1941 model tractor, which was one of the items of personal property required by said contract and decree of this court to be delivered to the defendants, to one George W. Nelson, a neighboring farmer. Shortly thereafter, Charles A. Dupee wrote the plaintiff informing him of what he had done and enclosed a check to plaintiff in the amount of \$570.00, which Charles A. Dupee claims represented the ceiling price of the tractor. Plaintiff immediately returned the check to Charles A. Dupee with a letter to the effect that he had no authority to sell the tractor and requesting him to return the money to the purchaser. Said check was not returned to the purchaser but was deposited in a bank account in the name of Charles A. Dupee in trust for the plaintiff. On December 20, 1945, plaintiff visited the farm of the said George W. Nelson and there repossessed himself of said tractor for the sum of \$900.00. On January 2, 1945 [1946], Charles A. Dupee closed the aforesaid trust account and forwarded to plaintiff another check for \$570.00, which plaintiff has never cashed and still has in his possession.



and stored elsewhere for sale - in the town of ...  
might be stolen from the farm while it remains unattended.  
Plaintiff alleges that he has represented himself as said  
tractor and has it and all the rest of the personal property  
in said contract mentioned, ready for delivery to defendant,  
pursuant to the terms of the contract and in view of this state.  
"From the evidence, both oral and documentary, the  
master finds as follows:

\* \* \*

"That on or about March 15, 1945, one Charles A. ...  
who was formerly tenant in possession of the ...  
these proceedings, said and delivered the ...  
model tractor, which was one of the items of personal property  
retained by said contest and before ...  
delivered to the defendant, to one ...  
paying farmer. Shortly thereafter, ...  
the plaintiff ...  
a check to plaintiff in the amount of \$770.00, ...  
A. Charles claims represented the ...  
plaintiff immediately ...  
with a letter to the ...  
The tractor and ...  
...  
...  
in trust for the plaintiff. On ...  
visited the farm of the said ...  
possessed himself of said tractor for ...  
January 2, 1945 [1946], Charles A. ...  
trust account and forwarded to plaintiff ...  
\$770.00, which plaintiff has never ...  
his possession.



"The master finds that in the spring of 1945 the said Charles A. Dupee caused to be removed from the farm in question the Delco Electric system, Montgomery-Ward washing machine, and Monarch coal and wood kitchen stove, mentioned in said contract and decree of this court; that said items, together with a radio and several chairs belonging to defendants, were delivered to the homes of several neighbors for safe-keeping during the period that the farm in question remained unoccupied; that the persons to whom said items were delivered were instructed to deliver them to the plaintiff when called for. The master finds that since their removal from the farm in question, the above mentioned items of personal property have been subjected to ordinary use, but the evidence shows that all are in substantially the same condition as when the contract was entered into.

"The master finds that the plaintiff has repossessed himself of said tractor and has it and all of the other items of personal property mentioned in said contract ready for delivery to the defendants pursuant to the terms of the contract and decree of this court.

\* \* \*

"The master concludes that plaintiff has all of the items of personal property mentioned in defendants' petition ready for delivery to defendants in accordance with the terms of the contract and decree of this court, and the master therefore recommends that defendants' petition to vacate the decree of this court entered December 3, 1945, be denied."

After a hearing on defendants' exceptions to the master's report the chancellor entered a decree approving said report and denying defendants' petition to vacate the decree for specific performance.



The master's report contains a correct and rather comprehensive statement of the facts established by the evidence and it is unnecessary to repeat such facts. They disprove every material allegation of defendants' petition to vacate and fully support the averments of plaintiff's answer thereto. The master could not have properly found otherwise than that "plaintiff has all of the items of personal property mentioned in defendants' petition ready for delivery to defendants in accordance with the terms of the contract and decree of this court."

Defendants, realizing that the decree denying their petition to vacate is not subject to attack on the ground that plaintiff "has put it out of his power" to comply with the terms of the decree for specific performance with reference to the personal property in question, have adopted a somewhat different theory in this court and now assert that "the decree entered herein should be vacated because (a) the plaintiff permitted his agent to deal with the personal property connected with the farm in a manner which was fraudulent as to defendants and to the court, and (b) the plaintiff violated the principle of equity that he must come into equity with clean hands, which principle persists and continues all through the trial of an equity cause."

That portion of defendants' theory designated (a) can only mean that the finding of the master that Dupee was not authorized to sell the tractor as plaintiff's agent was against the manifest weight of the evidence and that portion designated (b) must necessarily mean that, because the tractor was sold and the other articles of personal property removed from the farm during the pendency of the litigation that culminated in the decree for specific performance, plaintiff was





guilty of inequitable conduct.

Defendants' contention that plaintiff was guilty of inequitable conduct during the pendency of said litigation must be held to be without force, unless it can be said that the finding of the master that Dupee was not authorized to sell the tractor as plaintiff's agent was against the manifest weight of the evidence.

We deem it appropriate to supplement the statement of facts in the master's report by relating the circumstances, as shown by the evidence, leading up to the disposal of the personal property involved herein by Dupee. As has been seen, the exchange contract was executed by the parties on November 15, 1943. Plaintiff's complaint for specific performance was filed some time prior to January 1, 1944. Because of the wrongful refusal of defendants to perform the contract on their part, plaintiff, who lived in Chicago, kept Dupee on the farm as his tenant. At the time the contract was executed all of the articles of personal property described therein were on the farm and continued to remain thereon for at least 15 or 16 months or until March or April, 1945. Having decided sometime prior to March 1945 to leave the farm and go to California and knowing that the farm would be unoccupied after he left, Dupee, without plaintiff's knowledge, arranged with neighboring farmers for the removal to their homes for safekeeping of all the items of personal property, other than the tractor, with the understanding that they would return same to plaintiff upon his request. According to Dupee, he sold the tractor to a farmer in the vicinity because "I had no place to put it out there for safekeeping. I was leaving that part of the country."

All that need be said as to the articles of personal





property, other than the tractor, is that it was shown by undisputed evidence that Dupee on his own initiative caused them to be removed to neighboring farms to prevent their theft or destruction and his action in so doing was later approved by plaintiff. We think that plaintiff's approval of Dupee's conduct in this regard is to be commended rather than criticized.

As shown by the master's report, both plaintiff and Dupee testified positively that the latter was not authorized by the former to sell the tractor. Plaintiff repudiated its sale as soon as he learned of it and, according to Dupee, he merely thought that it was the best thing to do at the time. Defendants presented no substantive evidence that Dupee sold the tractor as plaintiff's agent or that he had any authority to sell it. The only evidence presented by defendants in this connection was for the purpose of impeaching plaintiff and Dupee. It is clear from all the evidence in the record that they did not succeed in accomplishing this purpose.

Not only were the findings and conclusions of the master and the decree appealed from not against the manifest weight of the evidence but they were completely justified by the facts and circumstances in evidence.

We are impelled to conclude that plaintiff acted in good faith from the day the contract was executed; that the only evidence of bad faith shown by the record was defendants' wrongful refusal to perform the contract; that plaintiff was equitably entitled to the decree of specific performance; and that defendants' petition to vacate said decree was properly denied.

The decree of the Circuit court of Cook county is affirmed.

DECREE AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

property, other than the tractor, is that it was shown by  
undisputed evidence that it was not the tractor's own  
them to be removed to maintain the tractor to prevent their  
theft or destruction and this action is not in itself  
approved by plaintiff. The fact that plaintiff's removal  
of tractor's control in this case is not the same as  
than criticized.

As shown by the evidence, plaintiff's removal of  
the tractor from the tractor's control is not the same as  
by the tractor to sell the tractor. Plaintiff's removal of  
sale as soon as the tractor is shown, and the tractor is  
merely showing that it was not the tractor's own  
defendants' property is not the same as the tractor's own  
the tractor as plaintiff's own as they are not the tractor's  
to sell it. The only evidence presented is that in 1941  
connection with the tractor's removal, plaintiff's  
appears. It is shown that the tractor was not the tractor's  
they did not intend to remove this tractor.

Not only were the tractor's removal and the tractor's  
merely and the tractor's removal from the tractor's control  
weight of the evidence but they were completely justified by  
the facts and circumstances in evidence.

So the removal of the tractor from the tractor's control is  
shown from the day the tractor was removed. The tractor  
only evidence of the tractor's removal by the tractor's own  
plaintiff's removal of the tractor from the tractor's control is  
entirely justified by the facts of the tractor's removal; and  
that defendants' removal of the tractor from the tractor's control  
denied.  
The tractor of the tractor's removal is  
affirmed.

44106

CALVIN M. HUTCHINSON,  
Appellant,

v.

RUTH E. HUTCHINSON,  
Appellee.

APPEAL FROM  
SUPERIOR COURT  
COOK COUNTY.

3381A.156

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a decree dismissing his complaint for divorce for want of equity and granting his wife a decree for separate maintenance on her counterclaim.

The parties were married in August 1933 in New Hampshire. Shortly thereafter plaintiff came to Chicago to seek employment. In July 1934 defendant came to Chicago where she lived with plaintiff until June 7, 1936, when by agreement with him she went to Maine to live with her mother until after the birth of her expected child. They have not lived together since that time. Defendant remained in Maine until the child was about two years old, receiving about \$5 a week from plaintiff. In October 1938 she returned to Chicago with the child, which has been with her at all times. Plaintiff did not suggest that she come. He met her at the train when she notified him of her coming, and took her to a friend's home where she remained several months. She then procured a room about two blocks from the Y. M. C. A. where plaintiff was living. She later moved to another rooming house on north Dearborn street. She received \$5 a week, then \$7 and finally \$10 from plaintiff, who visited her at various times without resuming the marital relation. In 1940 she procured employment, playing the organ in a small church and giving music lessons. In 1941 she obtained full-time employment in a publishing house and has been with



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them since.

In 1940 plaintiff went to Philadelphia. Defendant testified that nothing was said about her going with him; that he said he was going to get rid of defendant and a girl with whom he had been associating. Plaintiff testified that he went to Philadelphia to get a job; that he met a Miss Roberta Bell in Chicago; that she had written him from time to time; that she went to Philadelphia where he and she worked at the same place; that he believed the letter to his wife, dated August 26, 1941 and postmarked Philadelphia, received in evidence and signed "Roberta Bell," was in her handwriting; that he was in Philadelphia around that time. This letter stated that Miss Bell was in love with plaintiff and asked defendant to get a divorce from him. On April 24, 1941 plaintiff had written defendant from Philadelphia stating that he did not love her and asking her to get a divorce. September 19, 1941 he again wrote her, stating that he had an offer to go to South America for several years; that before going he wanted things between them straightened out and believed a divorce the best solution. In the same letter he asked her to go with him, leaving the child with her grandmother, and try to live according to his standards; that if after a reasonable time, say a year, either of them was dissatisfied she would return and let a Mr. Lind arrange a divorce. September 21, 1941 defendant replied to plaintiff's letter, refusing to go to South America and leave her daughter, telling plaintiff she had received the letter from Miss Bell. She suggested that she and plaintiff try to live together anywhere he wished, saying that he must see the futility of running after girls and that both of them had made mistakes. October 20, 1941 plaintiff wrote defendant, enclosing a check and stating that he had given up the opportunity to go to South America because of defendant's refusal to go; that he "could not think of going



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down there, and staying there alone, and just leaving things here as they are." He also suggested that she come to Philadelphia and let him "live in a normal healthful way." Plaintiff testified that defendant did not reply to this letter and did not come to Philadelphia to live with him; that some time after her refusal, October 1941, he made up his mind he did not want to live with her. Defendant testified that she replied to the letter, stating that she did not believe that it was a genuine invitation; that plaintiff never replied. In 1944 plaintiff returned to Chicago, where he has since lived. He continued payments to defendant, never exceeding \$65 a month. He did not visit his child.

Defendant is the daughter of a minister. She and plaintiff undoubtedly had conflicting ideas as to how they should live. The greater weight of the evidence shows a disposition on the part of defendant to try to get along with plaintiff. His right, if any, to a divorce rests upon the good faith of his request to defendant to go and live with him in Philadelphia in October 1941. His counsel contend that the separation in June 1936, being by agreement, the court cannot award separate maintenance on a separation commencing at that time. Plaintiff and defendant were the only witnesses. The evidence indicates overwhelmingly that since that separation plaintiff never made an honest effort to provide a home for defendant or their child or to reconcile their differences, except on the basis of an absolute surrender by defendant. He admits that he never asked defendant to return from Maine; that she came to Chicago on her own volition. He did not resume marital relations with her. He did associate with other women, as shown by his testimony and the letter of Miss Bell. His request that defendant go to South America with him was coupled with unreasonable conditions, that she leave her child here and that if he so decided, after a year, she should



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return and get a divorce from him. His request within a month that she come to Philadelphia and live with him, coupled with a request in the same letter that she get a divorce, was received with justifiable suspicion by defendant. Although the parties differ in their testimony as to whether defendant replied to this letter, the trial court, who had the opportunity of seeing the witnesses and hearing them testify, was justified in accepting defendant's testimony and rejecting plaintiff's. The evidence supports the finding that plaintiff intended that the apparently amicable and temporary separation of June 1936 should be permanent, and that plaintiff's October 1941 request that defendant go to Philadelphia and live with him was not made in good faith. He admits that after his offer he determined he did not want to live with defendant and that he was unwilling to live with her at the time of the trial. She testified to a willingness to live with him if he would provide a home. Plaintiff's requests that defendant live with him in Philadelphia and South America are not a defense to the action of separate maintenance, because not made in good faith and because the South America offer was based on unreasonable conditions. 27 Am. Jur., Husband and Wife, sec. 410.

The court did not err in admitting in evidence the letter from Miss Bell. The relations between her and plaintiff were established, and Miss Bell's request that defendant get a divorce from plaintiff came between letters from plaintiff making the same request, and under the circumstances Miss Bell's letter was competent.

The decree is affirmed.

AFFIRMED.

O'Connor, J., concurs.  
Feinberg, J., took no part.





44162

ARTHUR B. PILKINGTON,  
Appellant,

v.

HENRY L. BALABAN,  
Appellee.

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)  
)  
) APPEAL FROM  
) SUPERIOR COURT  
) COOK COUNTY.  
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3351A-156

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from an adverse judgment entered on defendant's motion to dismiss the complaint charging duress in the execution of a certain release signed by plaintiff and asking to have the release set aside, and for judgment for \$2,400 alleged to be due him as commission earned in procuring a tenant for defendant's property, for the reason that the complaint is "insufficient in law" and "states conclusions of the pleader and not facts upon which a claim of duress could be supported."

Plaintiff alleges that he procured Mrs. Allyson Alma Sims as a tenant for defendant's property; that a lease for 20 years at an aggregate rental of \$120,000 was entered into between defendant and Mrs. Sims; that at or about the time of the execution of the lease plaintiff and Mrs. Sims signed an instrument under seal reciting the release and discharge of defendant "from any and all claims or charges which the said Mr. Pilkington (plaintiff) may have by reason of furnishing a tenant for the above described premises, it being understood and agreed that any liability for real estate commission for furnishing tenant shall be borne by Allyson Alma Sims and not Henry L. Balaban"; that on presentation of the release "the defendant demanded that plaintiff affix his signature thereto, to which plaintiff at first declined and refused; whereupon the defendant did then and there become infuriated



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and violent, and placed his hand in his desk drawer, and then and there coercibly, menacingly and threateningly demanded that plaintiff sign said document; by reason of which fact plaintiff was put in great fear for his life, and did then and there believe that unless he did affix his signature to said document he would be mortally harmed or injured by the defendant, but for which fact plaintiff would not have affixed his signature thereto; that plaintiff did not affix his signature to said document as his free and voluntary act or deed, but the same was wrung from him through the menacing threats on the part of the defendant hereinabove set forth."

The alleged conduct of the defendant upon which plaintiff bases his action is that "the defendant did then and there become infuriated and violent, and placed his hand in his desk drawer, and then and there coercibly, menacingly and threateningly demanded that plaintiff sign said document." Except for the charge that the defendant "placed his hand in his desk drawer," there is no statement of any fact relating to the conduct of the defendant. The remaining charges that defendant became "infuriated and violent," and "coercibly, menacingly and threateningly demanded that plaintiff sign said document," are conclusions of the pleader without any statement of fact on which the conclusions could reasonably be based. Facts showing duress must be stated in the complaint. Bunker Hill Country Club v. McElhatton, 282 Ill. App. 221, 235; Betten v. Williams, 277 Ill. App. 353. In the absence of allegations requiring the surrender and cancellation of the release, plaintiff has no claim for commission against defendant. The complaint being defective in this respect, the court was justified in striking it, dismissing the suit and entering judgment for defendant, the plaintiff not having asked leave to file an amended complaint.

The judgment is affirmed.

Feinberg, J. concurs.  
O'Connor, J. dissents.

see next page.

AFFIRMED.

and violent, and placed his hand in the back of the

then and there so violently, menacingly and immediately

demanded that plaintiff sign said document; or because of

which fact plaintiff was out of the room for one day,

and did then and there believe that unless he signed

his signature to said document he would be seriously injured

or injured by the defendant, and the whole of the

would not have signed his document; that plaintiff

did not affix his signature to said document in his own

voluntary act or deed, but the same was signed from the

the mannered threats on the part of the defendant

set forth.

The alleged conduct of the defendant in this

will pass his action in that the defendant did not

become infuriated and violent, and threats were made to him

drawn, and then and there coercively, menacingly and

demanded that plaintiff sign said document. That the

where that the defendant placed his hand in the back of

there is no statement of any threat existing in the

defendant. The remaining elements that constitute

and violent, and coercive, menacing and threats

that plaintiff sign said document, and the

without any statement of fact on which the

reasonably be based. That the

the complaint. Plaintiff Bill v. Defendant, et al.

Aug. 25, 1921; Plaintiff v. Defendant, et al.

absence of allegations regarding the

of the release, plaintiff has no claim for

defendant. The complaint being defective in this respect, the

court was justified in finding it, and

entering judgment for defendant, the

leave to file an amended complaint.

The judgment is affirmed.



3.

MR. JUSTICE O'CONNOR DISSENTING:

I think the complaint is sufficient.

Before the Civil Practice Act went into effect January 1, 1934, our Supreme court in discussing the question of pleading in Park Coal Co. v. Wabash Ry. Co., 338 Ill. 82 said (p. 87): "While the declaration as amended is somewhat inartistically drawn, yet at the present time in this State many of the niceties and technicalities of ancient pleading have been abandoned, and all that is now necessary in the statement of a plaintiff's claim in a declaration is a clear and concise statement, couched in simple language, of sufficient ultimate facts to show a liability on the part of the defendant to the plaintiff." To the same effect are Zimmerman v. Willard, 114 Ill. 364; Crane v. Schaefer, 140 Ill. App. 647; Zister v. Pollack, 262 Ill. App. 170; N. Y. Cent. & H. R. R. Co. v. Kinney, 260 U. S. 340. The opinion in the last case was delivered by Mr. Justice Holmes.

The Civil Practice Act, ch. 110, Ill. Rev. Stats., 1947 sought to eliminate many of the technicalities required by the common law pleading. Sec. 33 provides:

"(1) All pleadings shall contain a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply.

"(3) Pleadings shall be liberally construed with a view to doing substantial justice between the parties.."

Section 42 "(1) If any pleading is insufficient in substance or form the court may order a fuller or more particular statement, and if the pleadings do not sufficiently define the issues the court may order other pleadings prepared.

"(2) No pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which





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he is called upon to meet."

The Civil Practice Act has been construed in Carlton v. Smith, 285 Ill. App. 380; Anderson v. Biesman and Garrick Co., 287 Ill. App. 507; Chamblin v. N.Y. Life Ins. Co. 292 Ill. App. 532; Anderson v. Behr, 299 Ill. App. 90; People for the use of Jones v. Leviton, 327 Ill. App. 309. And our Supreme court on the question of pleading has construed the Practice Act liberally, see Crosley v. Weil, 382 Ill. 538, and many other cases.

In Fisher v. Jensen, 30 Ill. App. 91, Judge Gary, speaking for the court quoted from a case of the Supreme court delivered by Mr. Chief Justice Caton, the following: "'Courts will not pretend to be more ignorant than the rest of mankind,' says Caton, J., in Munn v. Burch, 25 Ill. 35."



WALTER J. RINN, CHARLES F. POGGE  
and RAYMOND C. POGGE,  
Plaintiffs,

v.

BROADWAY TRUST AND SAVINGS BANK  
OF CHICAGO, a banking corporation,  
et al.,  
Defendants.

PEOPLE OF THE STATE OF ILLINOIS,  
et al.,  
Plaintiffs,

v.

BROADWAY TRUST AND SAVINGS BANK  
OF CHICAGO, a banking corporation,  
et al.,  
Defendants.

On Appeal of WALTER J. RINN,  
CHARLES F. POGGE, and RAYMOND C.  
POGGE,  
Appellants.

APPEAL FROM  
CIRCUIT COURT  
COOK COUNTY.

3351A 157

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from a decree dismissing for want of equity their amended and supplemental complaint, as amended, seeking with other relief an accounting by the liquidator of the Broadway Trust and Savings Bank of Chicago, its officers and directors. The trial was before the chancellor.

From the evidence and admissions in the pleadings it appears that on June 23, 1934 the directors of the bank passed a resolution to discontinue the banking business and pay off the depositors and other creditors. The bank ceased receiving deposits and a public notice was given that depositors would be paid. By a resolution of the board of directors as of July 31, 1934, Arthur G. Strassheim, president, was appointed liquidator with authority "to liquidate all of the assets of

WALTER J. LIND, JR.  
and RAYMOND C. LIND  
Attorneys

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 GEORGE, a mining corporation,  
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OF CHICAGO, a bearing corporation,  
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1968

[illegible]

From the evidence and testimony it was determined that it appears that on June 25, 1944 the directors of the bank passed a resolution to discontinue the banking business and the directors and other creditors. The bank ceased receiving deposits and a public notice was given that deposits would be paid. By a resolution of the board of directors on July 31, 1944, Arthur G. Strauchman, president, was appointed liquidator with authority to liquidate all of the assets of



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the bank and make proper distribution of the proceeds of such liquidation." All depositors calling for their deposits were paid and on March 5, 1935 the liquidator deposited with the State auditor \$10,271.08, the full amount due depositors not appearing. When the bank ceased doing a banking business it was indebted to the Harris Trust & Savings Bank, to the Reconstruction Finance Corporation on Class A debentures, and to Arthur G. Strassheim in the sum of \$25,000 on Class B debentures authorized by the board of directors April 10, 1934 and made subordinate to Class A debentures and the claims of deposit and general creditors. The bank was also liable on a written lease for its banking quarters entered into May 22, 1928 and expiring April 30, 1948, at a rental of \$1,500 to \$2,000 per month for the years 6 to 20 inclusive. The liability to the Harris Trust & Savings Bank was discharged in a comparatively short time. The Reconstruction Finance Corporation was paid off in 1939 or 1940. On April 28, 1945, in the suit of the State auditor to liquidate and dissolve the bank, hereafter mentioned, the court allowed the claim of Arthur G. Strassheim for \$5,418.15, the balance due on his Class B debentures. On April 25, 1945, in the same suit, the claim of the lessors on the written lease for the bank quarters was allowed at \$31,650. No formal action of the stockholders authorizing a dissolution of the bank was taken and no deposit with the State auditor of money sufficient to meet the debts and demands against the bank, other than deposit liabilities, was made as required by section 15 of the Illinois Banking Act. Ill. Rev. Stat. 1947, chap. 16 1/2, par. 15. April 4, 1944, Rinn, a stockholder holding five shares of the capital stock, for himself and other stockholders instituted a suit for an accounting, dissolution of the bank and distribution of the assets to the persons entitled. April 29, 1944, the State auditor filed a suit against the bank under section 11 of the Banking act, alleging that he began an examination of the bank on April 17,



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1944, and on April 28 had determined that the capital stock was impaired and had appointed a receiver with the usual power. The complaint contained the usual prayer as to final dissolution of the bank, etc. June 26, 1944 a decree was entered ordering, adjudging and decreeing that the auditor's appointee was the lawfully constituted receiver of the bank and that upon the termination of the receivership and coincidental with the discharge of the receiver by the auditor of public accounts, the corporate existence of the bank be forthwith and is thereby declared dissolved. Two stockholders, holding 125 shares, joined as plaintiffs in the stockholders' suit. On motion of defendants the suit was dismissed for want of jurisdiction and leave to file an amended and supplemental complaint was denied. On appeal this court (326 Ill. App. 376) reversed the orders appealed from and remanded the cause with directions, including the direction to permit the filing of the amended and supplemental complaint.

On that appeal the defendants urged, as they urge on this appeal, that the court is without jurisdiction except in a suit brought by the State auditor under section 11 of the Banking act. We denied that contention and held that the statute did not apply. Our decision is the law on this appeal, if the evidence on the trial established the facts alleged in the pleadings then before us. These facts, as stated (p. 381), were that the bank had not been doing a banking business for nearly ten years and that the depositors had been paid and every obligation that had arisen out of its banking business had been satisfied. The evidence does not sustain the latter allegation. It was shown conclusively that obligations to general creditors were unpaid when the auditor's suit was instituted and when the amended and supplemental complaint was presented and at the time of the trial, after it had been filed pursuant to our mandate. Upon the facts established by the



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the evidence, the right to dissolve the corporation and distribute its assets was vested exclusively in the State auditor under section 11 of the Banking act. Nelson v. Toluca State Bank, 334 Ill. 83; People v. Shurtleff, 353 Ill. 248; Scalzo v. Com'l Trust & Sav. Bank, 239 Ill. App. 330. The receiver appointed by the State auditor was invested with title to all the assets of the bank, including choses in action, and he alone could bring the action which plaintiffs are endeavoring to prosecute. McIlvaine v. City Nat. Bank & Trust Co., 314 Ill. App. 496; Lorimer v. Rosehill Cemetery Co., 325 Ill. App. 258. If the receiver neglected or refused to act, the stockholders' remedy was an application to the court supervising the liquidation of the bank. McIlvaine v. City Nat. Bank & Trust Co., supra. Acquiescence by the State auditor in the attempted liquidation of the bank and consequent delay in taking action did not bar his right to proceed under section 11. Long v. Farmers & Merchants State Bank, 300 Ill. App. 426.

As hereafter shown plaintiffs did not bring themselves within the general powers of a court of equity to redress wrongs to a corporation at a suit of stockholders. In the amended and supplemental complaint as amended on which the case was tried plaintiffs state that they file it "in their own names and for the common use and benefit of all stockholders," and that "no demand has been made by plaintiffs of the bank or its officers to commence this action, because all of the officers and directors are parties to the conspiracy to deplete the assets of the bank for their own personal use and are guilty of gross negligence, and a demand on them to institute suit would be useless, and they cannot be expected to commence suit against themselves." Some of the defendants contended that the suit is brought on behalf of the stockholders when it should have been brought for and on behalf of the corporation, citing Murphy v. Candor, 263 Ill. App. 226, and





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McIlvaine v. City Nat. Bank & Trust Co., 314 Ill. App. 496.

Our former opinion is conclusive on the right of plaintiffs to bring their action, and we think it sufficiently appears from the complaint, taken as a whole, that relief is sought for and on behalf of the banking corporation, which is made a party to the suit. It is, however, as claimed by defendants, a condition precedent to such action that the stockholders exhaust their remedy within the corporation before bringing suit. McIlvaine v. City Nat. Bank & Trust Co., supra,, page 521, and authorities cited. Plaintiffs have met this requirement in their amended and supplemental complaint as amended, as heretofore quoted, by asserting that a demand would be useless because of an alleged conspiracy between the directors and wrongdoing by them. As stated by the trial court in his decision, the proof fails to sustain the allegation either by proving a conspiracy or proving fraud in the individual acts of the defendants. Plaintiffs' auditor was given access to the books of the bank covering its transactions before and after it ceased doing business. The charge is made that certain books and records were destroyed. The receiver appointed by the auditor testified that certain secondary records were destroyed in accordance with the practice of the auditor's office. Plaintiffs' auditor does not point out any missing records which might throw any light on any transaction wherein fraud is charged. He testified to nothing indicating incorrect or incomplete records. No complaint is made of any transaction while the bank was carrying on its general banking business. Detailing the evidence relating to various transactions charged as fraudulent would serve no useful purpose. Several of the items were covered by orders of court in the auditor's suit, from which no appeal has been taken. One related to the compromise of a note for \$6,250. The answer of the maker of the note, a defendant, alleges that the original loan, made many years before the bank closed, approximated



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\$6,000, which with accrued interest amounted to \$16,238.01, when a new note was given February 26, 1939; that the statement of his assets and liability attached to his offer of compromise was true and correct. There is nothing in the record to the contrary. The compromise order in the auditor's suit, allowing \$31,650 on the lease for the banking quarters (the lessors claiming in excess of \$200,000 under the terms of the lease), is also questioned. No evidence, offered or introduced, raises any suspicion as to the honesty of this compromise. The liquidator was trustee of several properties reorganized after foreclosure, and individually owned certain bonds on each property which were turned over to the bank and later sold at less than their face value. There is no evidence of the price received when these bonds were turned over to the bank, although plaintiffs' auditor had access to the books and testified on the trial. There is no evidence of the market value of the bonds at any time. We take notice of the fact that many real estate mortgage bonds were sold at reduced prices during the period of the bank's liquidation.

Plaintiffs also complain of collusion between the defendants and the State auditor resulting in the appointment of the receiver by the State auditor and the bringing of his suit. Undoubtedly this action was taken at the suggestion or request of defendants. It was in the discharge of the duties imposed on the auditor, and no improper, irregular or prejudicial conduct of the State auditor or his receiver is shown. Some of the defendants urge that the franchise of the bank is involved and therefore the appeal should have been taken to the Supreme court, this court being without jurisdiction. We do not believe their position is tenable. Chicago Steel Works v. Illinois Steel Co., 153 Ill. 9, 16; Ryan v. City of Chicago, 363 Ill.





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607, 609, and, because of the conclusion reached on the merits of the case, we do not believe that defendants will further press this objection.

The decree is affirmed.

AFFIRMED.

Feinberg and O'Connor, JJ., concur.

and, because of the similarity of the  
 to that of the case, we do not believe that it is  
 all further down this section.  
 The letter is attached.

Yours,

Frederick and Leonard, Jr., Boston.

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) APPEAL FROM  
) SUPERIOR COURT,  
) COOK COUNTY.

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33 LA. 1581

Plaintiff, an employee of the railway company, was on his way to work at the time of the accident. He alighted from a street car at the northwest corner of 86th Street and Burley Avenue in Chicago, the usual place for discharging passengers. Immediately to the south of 86th Street the tracks of the railway company cross Burley. Most of the space between the south curb



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of 86th Street and the northernmost rail of defendant's tracks is occupied by guide posts and equipment of the railway company. There is no crosswalk on the south side of 86th Street, which runs west to Burley but does not cross it. Burley is a wide highway with street car tracks running north and south at that point.

When plaintiff alighted from the street car he walked across 86th Street to the location of the watchman's shanty of the railway company, engaged in conversation there for a moment or two with the company's watchman, then proceeded on the south side of 86th Street to cross Burley to the east side. He saw defendant Van Sweringen's automobile some distance to the south of the railway company's tracks and saw it coming north on Burley, straddling the northbound street car tracks. He testified, "I saw the automobile from the time I first saw it until the time I was injured". He continued to cross Burley and did not stop, notwithstanding the approach of the automobile.

It appears that Van Sweringen was an employee of the steel company and turned in on Burley at 87th Street, going north. He was familiar with the location of defendant's tracks and the operation of its gates, having crossed the tracks twice daily for nine years. He claims that when he was within 10 or 15 feet of the gates, they started to lower; that he speeded up his automobile and swerved it to the right in order to avoid the gates as they were being lowered, and struck plaintiff. No train was moving at the time he speeded up his car. The freight cars stopped at the west sidewalk of Burley and had not crossed Burley nor come in contact with the automobile. It appears that the standard on the southeast gate of the set that was operated at the crossing, which when completely lowered rests on the pavement, scraped the top of the automobile. The evidence in the record convinces us that within a distance far enough for



of 88th Street and the northernmost wall of the building.

The area is occupied by a large lot and is bounded by the

railway company. There is a building on the south side

of 88th Street, which runs east to 90th Street and

across it. There is a wide highway with street car tracks

running north and south at this point.

When plaintiff arrived from the street car he found

across 88th Street to the location of the building, a group

of the railway company, located in a building on 88th Street

a moment or two after the plaintiff's arrival, and

on the south side of this street is a street car track

also. He saw defendant's automobile on the south side of

the street at the railway company's building and saw it

turn on a wheel, following the railroad street car tracks.

He testified, "I saw the automobile from the time I first saw

it until the time I was injured". He continued to testify

that he did not stop, notwithstanding the fact that

automobile.

It appears that the defendant was in charge of the

street car company and located in a building at 88th Street, near

north. He was familiar with the location of defendant's house

and the location of the street car tracks, which crossed the street

daily for nine years. He stated that when he was riding in the

at first of the street car, that he was riding in the

up his automobile and observed it in the street in front of him

the street car they were riding towards, and during the time

train was moving at the time he was riding in the street car.

cars stopped at the time plaintiff's car was stopped and

he did not come in contact with the automobile. It appears

that the defendant on the southern side of the street was

located at the crossing, which then completely blocked the

on the highway, around the top of the automobile. The witness

in the street car company as that which was the cause of the

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Van Sweringen to have stopped his automobile if he had exercised any care he could have seen the gates lowering had he looked. He had other men in the car with him on the front seat, and he testified that he might have been talking. There was nothing to obstruct his vision and no reason shown why he could not have seen these gates as they started to lower, nor hear the ringing of the bell as a warning, before he reached the railway tracks. Clearly, his conduct under the circumstances, which resulted in injury to plaintiff, constituted negligence. The jury found him guilty of negligence, and he does not appeal from the judgment on the verdict.

The first contention of the defendant we shall discuss is the alleged error of the trial court in denying its motion in arrest of judgment. It argues that this court on the prior appeal held the complaint good as to the railway, because of the allegations in sub-paragraph (b) of paragraph 9 of the complaint, which alleged that "as the train was about to cross Burley avenue he lowered the gates then raised them and was lowering them again when Van Sweringen, in an endeavor to avoid the gates, and from being trapped on the crossing, speeded up his automobile and struck plaintiff as he was crossing Burley avenue": that upon the trial of the case this allegation was withdrawn; therefore, there was no cause of action stated in what remained of the complaint against the railway company. With this contention we cannot agree. There is sufficient alleged in paragraphs 4 and 9 to charge joint negligence of the railway company and Van Sweringen as the proximate cause of the injury to plaintiff. It was not error to deny the motion in arrest of judgment.

Defendant contends that at the time of the accident in question it owed no greater duty to plaintiff, though an employee of the defendant on his way to work at the time, than it owed to any pedestrian on the street; that it did nothing

Van Gersingen to have crossed his automobile if he had  
 exercised any care he could have seen the gates locked and  
 he looked. He had often seen in the past with him on the  
 front seat, and he testified that he did not see anyone  
 "there was nothing to prevent his riding and he would have  
 with an arm, not have seen these gates" that he saw no person  
 nor near the vicinity of the hotel as a matter of fact, he  
 passed the railway tracks. Clearly, his testimony is a  
 circumstance, which is in itself, a circumstance, and he  
 mentioned. The fact that the gates were locked, and he  
 does not admit from the evidence to be a witness.  
 The first question of the court is whether or not the  
 is the alleged error of the trial court in excluding the evidence  
 in view of the fact. It is true that the court in the trial  
 court held the evidence to be inadmissible, because it  
 the allegations in the complaint (b) of negligence of the  
 complaint, which also on that day the train was about to enter  
 Hurley Avenue as located, the gates were locked and the  
 lowering them again when the accident occurred, in an endeavor to  
 avoid the accident, and from having been on the ground, having  
 up his automobile and driving rapidly he was struck  
 Hurley Avenue: that upon the fact is that the trial court  
 was withdrawn; therefore, there was no error in excluding the  
 what remained of the complaint against the railway company. It  
 this contention as stated above. There is nothing wrong  
 in paragraphs 4 and 5 to a large joint possession of the railway  
 company and Van Gersingen as the evidence shows it was common  
 to plaintiff. It was not error to have the matter in dispute  
 of judgment.

Defendant contends that at the time of the accident in  
 question it used no greater duty to plaintiff, and that an  
 employee of the defendant or his agent was at the time,  
 then it owed to any person on the street; that it did nothing

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to injure plaintiff; that neither its train nor the gates in question struck plaintiff; that the evidence wholly fails to prove any negligence on the part of the railway company.

Other contentions raised by defendant, involving instructions and rulings on evidence, we deem unnecessary to discuss.

It is undisputed that plaintiff had a clear view of the approaching automobile up to the very moment he was injured. Plaintiff was struck in 86th Street and not on the railway company's right-of-way. He was thoroughly familiar with the operation of the railway gates at this particular crossing. He must have observed the gates being lowered and the warning signal in operation before he was struck by the automobile. There is no logical reason presented why plaintiff should not have observed the negligent operation of the automobile. The charge of negligence in sub-paragraph (b) of paragraph 9 of the complaint was withdrawn from the jury because plaintiff did not prove the charge that the gates were lowered, then raised, then lowered again, which trapped Van Sweringen on the crossing and caused him to speed up his automobile, striking plaintiff. Had plaintiff been able to sustain the charge, so withdrawn, he might argue that the raising of the gates after they once started to lower was an invitation to Van Sweringen to proceed across the railway company's tracks, thus affording plaintiff reason to anticipate that Van Sweringen would drive the car in a straight path instead of being forced to swerve it against plaintiff. We are convinced from the evidence that there was but one operation in the lowering of the gates - that when they started to lower, they continued to be lowered until it was too late to avoid the scraping of the standard on the top of the automobile. We see nothing in this evidence, viewed in its most favorable light, and with all reasonable inferences that can be drawn in favor of plaintiff, to indicate any negligence



to injure plaintiff; that either the train nor the gates

in question struck plaintiff; that the evidence shows

plaintiff to prove any negligence on the part of the railway

company.

Other contentions raised by defendant, involving questions of fact and law, are as follows:

It is undisputed that plaintiff was a motorist at the time

approaching automobile up to the very moment he was injured.

Plaintiff was struck in 8th Street and not on the railway

company's right-of-way. He was thoroughly familiar with the

operation of the railway gates at this particular crossing.

He must have observed the gates being lowered and the warning

signals in operation before he was struck by the automobile.

There is no logical reason presented why plaintiff should not

have observed the negligent operation of the automobile. The

charge of negligence in sub-paragraph (b) of paragraph 2 of

the complaint was withdrawn from the jury because plaintiff

did not prove the charge that the gates were lowered, then raised,

then lowered again, which caused Van Sweringen to be crossing

and caused him to speed up his automobile, striking plaintiff.

Had plaintiff been able to establish this charge, he withdrew,

he might argue that the raising of the gates after they once

started to lower was an invitation to Van Sweringen to proceed

across the railway company's tracks, thus absolving plaintiff

reason to anticipate that Van Sweringen would drive the car

in a straight path instead of being turned to answer it against

plaintiff. We are convinced from the evidence that there was

but one operation in the lowering of the gates - that when they

started to lower, they continued to be lowered until it was too

late to avoid the scraping of the standard on the top of the

automobile. We see nothing in this evidence, viewed in its

most favorable light, and with all reasonable inferences that

can be drawn in favor of plaintiff to indicate any negligence



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of the railway company. Nor does the evidence so considered create any legal duty on the part of the railway company to reasonably anticipate that Van Sweringen would fail to heed the lowering of the gates or the warning signal, and would insist upon speeding up his automobile in the hope of crossing the railway tracks before the gates were completely lowered, and then swerve his car when he discovered his judgment was faulty, and strike plaintiff. Miller v. S. S. Kresge Co., 306 Ill. 104; Palsgraf v. Long Island R. Co., 248 N. Y. 339.

In Dabrowski v. Ill. Cent. R. Co., 303 Ill. App. 31, this court said:

"Assuming a duty due from one person to another and neglect thereof, liability for the neglect is limited in law to results which reasonably could have been anticipated. Without such a rule people could not safely live in our complex society."

and quoted from McClure v. Hoopeston Gas & Electric Co., 303 Ill. 89:

"Proximate cause is that which naturally leads to or produces, or contributes directly to producing, a result such as might be expected by any reasonable and prudent man as likely to directly and naturally follow and flow out of the performance or non-performance of any act."

The evidence fails to establish any negligence on the part of the defendant railway company and any duty it owed to plaintiff that it violated. It is clearly established that plaintiff was guilty of contributory negligence, which proximately caused his injury. As already pointed out, he could not be oblivious to the approach of the automobile, continue to keep his eye fastened on it, as he admits, and not see the negligent conduct pursued by Van Sweringen. Plaintiff cannot claim that he was suddenly and unexpectedly placed in a position of imminent danger, when throughout the entire occurrence had he exercised ordinary care for his own safety,

of the railway company. Nor does the evidence so established  
 create any legal duty on the part of the railway company  
 to reasonably anticipate that the defendant would fail to keep  
 the lowering of the gates at the station closed, and would  
 insist upon opening up his automobile in the way of traffic.  
 The railway tracks before the gates were not fully lowered,  
 and then drove his car over the obstruction and injured his  
 family, and struck plaintiff. Ill. v. ...  
108 Ill. 104; Railroad v. ...  
In Deppendorf v. Ill. North. Ry., 200 Ill. 404.  
 This court said:

"Assuming a duty due from the railway to keep  
 and neglect to do so, liability for the injury is  
 limited in law to the extent of the damage done to  
 the automobile. It is not such a case as  
 could not fairly live in the law of negligence."

and quoted from Deppendorf v. Ill. North. Ry., 200 Ill. 404  
 Ill. 89:

"Proximate cause is that which produces the  
 injury, or which, if it had not been for it,  
 the injury would not have occurred. It is not  
 by any means necessary that the injury be  
 directly and immediately caused by the  
 negligence of the defendant, or that it be  
 the result of a single cause."

The evidence fails to establish any negligence of the  
 part of the defendant railway company and any duty it may  
 to plaintiff that is violated. It is clearly established that  
 plaintiff was guilty of contributory negligence, which  
 proximately caused his injury. He directly caused his injury, and  
 not be oblivious to the approach of the automobile, and  
 to keep his eye fastened on it, as he admits, and not see  
 the negligent conduct pursued by the defendant. The fact  
 cannot claim that he was suddenly and unexpectedly placed in  
 a position of imminent danger, and throughout the entire  
 occurrence had he exercised ordinary care for his safety,

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he would have refrained from continuing on his walk across Burley and across the northbound street car tracks in the path of the approaching automobile. He cannot now insist, in the face of all this, upon a right to recover against the railway company for his injuries.

Plaintiff strongly relies on Langston v. C. N. W. Ry Co., 398 Ill. 248. We regard that case as having no application to the facts in the instant case. In that case the railroad had installed danger signals to warn the traveling public of the approach of trains. The plaintiff, familiar with the crossing, relied upon the operation of the danger signals. The proof was clear that the danger signals failed to operate at the time of the collision between plaintiff's automobile and the side of defendant's train at the crossing, on a foggy night when visibility was obscured. Such facts are not comparable with the facts in the instant case.

The judgment of the Superior Court as to the railway company is reversed.

JUDGMENT REVERSED.

Niemeyer, P. J., concurs.

Mr. Justice O'Connor dissents:

In my opinion the trial judge was warranted in denying defendant's motion, made at the close of all the evidence, for a directed verdict and in not entering judgment notwithstanding the verdict. Libby, McNeill & Libby v. Cook, 222 Ill. 206; Moran v. Gatz, 390 Ill. 478.

Counsel for defendant say: "Upon almost identical facts this court in Good v. Behrendt, 321 Ill. App. 303 [Abst.] held the plaintiff guilty of contributory negligence" and quote at length from that opinion. The facts in that case are not similiar to the facts in the case before us. There plaintiff

he would have remained from continuing on his path across  
Barley and across the railroad right-of-way in the  
path of the approaching automobile. He cannot see clearly  
in the face of all this, and a light is necessary  
the railway company for his safety.

# Plaintiff's Motion for Judgment on Pleadings

308 Ill. 448. He argues that even as shown by the evidence  
to the facts in the instant case. In fact, the defendant  
had installed danger signals to warn the traveling public  
of the approach of trains. The signals, installed with the  
operation, which upon the ground of all the facts, it is  
The proof was that the defendant's failure to install  
at the time of the collision between plaintiff's automobile  
and the side of defendant's train at the crossing, was a  
negligent when visibility was obscured. Even facts are not  
compatible with the facts in the instant case.

The judgment of the Superior Court is hereby affirmed.

Company is reversed.

Respectfully,  
J. J. Connelley

Attorney, J. J. Connelley

Dr. Justice O'Connor dissenting:

In my opinion the trial judge was not wrong in directing  
defendant's motion, made at the close of all the evidence, for  
a directed verdict and in not entering judgment notwithstanding  
the verdict. Ill. v. Connelley, 308 Ill. 448, 201 Ill. 448;

Connelley v. Connelley, 308 Ill. 448.

Connelley for defendant says: "When clearly identified, there  
this court in Connelley v. Connelley, 308 Ill. 448, 201 Ill. 448.  
the plaintiff's liability of contributory negligence was shown  
length from that opinion. The facts in the instant case are  
similar to the facts in the case before me. Where plaintiff

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was crossing a boulevard, which was a four-lane "through" street, 2 lanes for eastbound and 2 for westbound traffic, and has "stop" signs for traffic entering Diversey.



7.

was crossing a boulevard, which was a four-lane highway,  
street, 8 lanes for eastbound and 8 for westbound traffic,  
and has "stop" signs for traffic entering from the west.

44092

IRVING H. SIEGAL,  
Appellant,

v.

TRAV-LER KARENOLA RADIO & TELEVISION  
CORPORATION,  
Appellee.

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

33214158<sup>2</sup>

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

This appeal is from an order dismissing plaintiff's complaint with prejudice and entering judgment for costs.

The complaint, filed November 5, 1945, in three counts at law seeks to recover in trover for wrongful conversion of a certain steel mold. The fourth count is in equity, alleging inter alia that plaintiff on November 7, 1940, purchased said steel mold from the receiver in bankruptcy of the Telex Radio & Television Company, bankrupt; that said steel mold was used for the production of radio cabinets; that plaintiff also purchased from said receiver all designs, styles, trademarks and common law copyrights covering said radio cabinets and radio sets, including the design produced by use of said steel mold and they hereby became the property of plaintiff; that plaintiff became the exclusive owner of the right to have all merchandise produced by use of said mold; that said radio cabinets produced by the use of said mold have certain characteristics easily recognizable as having been made by such use, among which are the number and direction of the grills on the exterior of the cabinets, the shape of the cabinets, the indentations recessed therein and the entire styling of the cabinets; that since its wrongful conversion defendant has continuously manufactured and sold to the general radio public, department stores, dealers and jobbers throughout the United States radio sets

1971

PROPERTY & OTHER DOCUMENTS FILED  
IN THE OFFICE OF THE  
CLERK OF THE DISTRICT COURT  
AT  
SALT LAKE CITY, UTAH

This record is now being furnished to the  
consolidated with the original and retained for reference.  
The complaint, dated November 11, 1940, in which  
complaints at law were made to recover the balance of the  
value of a party in that suit. The record is now  
being, after the first time, the original of the record.  
1940, purchased said steel mold from the company in which  
it was sold to a party in which the company, the steel  
steel mold was sold for the collection of the original  
that the steel mold was purchased from the party in which  
the steel mold was sold for the collection of the original  
radio cabinet and radio set, including the original  
by use of said steel mold and any other means the party  
party of the steel mold; that the party in which the original  
owner of the steel mold has not been able to recover the  
of said mold; that said steel mold is now in the possession  
of said party and certain correspondence with the company  
has having been made by such party, which has the original  
and direction of the party in the possession of the original,  
the name of the company, the original record is now in  
and the entire copy of the original; that since the  
original copy of the original has been retained for reference,  
and sold to the general public, dependent upon,

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with cabinet style and design which imitate and cannot be distinguished from the design and style of cabinet which plaintiff has the exclusive right to manufacture and sell, without closest inspection by an expert, so that purchasers of cabinets so sold by defendant confuse the said cabinets with products made and sold by the Telex Radio & Television Company, which plaintiff now has exclusive right to manufacture and sell; that defendant has manufactured and sold such radio cabinets, well knowing that plaintiff was the exclusive owner of all rights to said style and design, and unless defendant is restrained by order of court it will continue to do so, causing plaintiff irreparable damage and require plaintiff to bring a multiplicity of suits against defendant; that plaintiff has suffered damages in the amount of \$50,000 and prays that defendant be enjoined from manufacturing and selling said radio cabinets and any radio cabinet which will cause the general public to believe that the same is the manufacture of said Telex Radio & Television Company or plaintiff, as its successor; that an account be taken of all profits made by defendant by reason of its appropriation and use of the style and design of said cabinet, and that plaintiff may have judgment in the sum of \$50,000 and such other and further relief as the court may deem just and equitable.

Defendant filed its answer, alleging that it purchased from International Molded Plastics, Inc. the mold in question, which was in the possession of said vendor, and received a bill of sale for the same. It admits that plaintiff made demand on October 27, 1945, for said mold, but denies plaintiff had any right to the same and denies that defendant converted it to its own use in derogation of plaintiff's right, title or interest; that in January, 1941, plaintiff knew defendant purchased the mold from International Molded Plastics, Inc. and

with cabinet style and design which feature and manner  
be distinguished from the design and style of cabinet  
which plaintiff has the exclusive right to manufacture and  
sell, without closest inspection by an expert, no one  
purchaser of cabinets so sold by defendant could not  
said cabinets with evidence and said by the fact that  
& Television Company, which plaintiff has the exclusive right  
to manufacture and sell; that defendant has manufactured and  
sold such radio cabinets, well knowing that plaintiff was  
the exclusive owner of all rights in said style and design  
and unless defendant is restrained by order of court it  
will continue to do so, causing plaintiff to suffer monetary  
and positive plaintiff to bring a suit for damages  
against defendant; that plaintiff has suffered damages in  
the amount of \$50,000 and prays that defendant be enjoined  
from manufacturing and selling said radio cabinets and that  
radio cabinet which will cause the general public to believe  
that the same is the manufacture of said radio cabinet  
Television Company or plaintiff, or its successor; that an  
account be taken of all profits made by defendant by reason  
of its exploitation and use of the style and design of said  
cabinet, and that plaintiff may have judgment in the sum of  
\$50,000 and such other and further relief as the court may  
deem just and equitable.

Defendant filed its answer, alleging that it purchased  
from International Radio Electric, Inc. the mold in question,  
which was in the possession of said vendor, and received a  
bill of sale for the same. It admits that plaintiff made  
demand on October 27, 1943, for said mold, but denies plaintiff  
had any right to the same and denies that defendant converted  
it to its own use in violation of plaintiff's rights, either  
or later; that in January, 1944, plaintiff knew defendant  
purchased the mold from International Radio Electric, Inc. and



3.

made no claim for said mold until October 27, 1945; therefore, said claim is outlawed under the Statute of Limitations.

Plaintiff filed a reply to said answer, in which he denied that defendant became the owner of the mold on January 15, 1941, and denied that plaintiff knew in January, 1941, that defendant purchased said mold from International Molded Plastics, Inc.

On October 29, 1946, defendant, by leave of court, filed its petition, alleging that on October 25, 1945, plaintiff had filed an action in attachment in the Superior Court of Cook County against International Molded Plastics, Inc., containing a trover count for the wrongful conversion of the same mold referred to in the instant action; that the said attachment action came on for hearing and a judgment in trover was recovered on April 8, 1946, by plaintiff against said International Molded Plastics, Inc., in the sum of \$1350, and that on April 17, 1946, a satisfaction of said judgment was filed of record in said action against International Molded Plastics, Inc.; that said judgment and satisfaction of the judgment constitute a bar to the action of plaintiff.

A motion to dismiss was filed with said petition, attached to which motion were copies of the complaint filed by plaintiff against International Molded Plastics, Inc., the answer of the latter company to said complaint and a copy of the satisfaction of judgment filed in said latter action. Upon a hearing of said undenied petition on November 13, 1946, the court dismissed the instant action.

On December 9, 1946, plaintiff petitioned the court to set aside the order of dismissal and prayed for leave to file an amended complaint, a copy of the proffered amended complaint was

made no claim for said mold until October 17, 1946; therefore, said claim is outlived under the Statute of Limitations.

Plaintiff filed a reply to said answer, in which he denied that defendant became the owner of the mold by assignment, 18, 1941, and denied that plaintiff knew in January, 1941, that defendant purchased said mold from International Molded Plastic, Inc.

On October 29, 1946, defendant, by leave of court, filed its petition, alleging that on October 10, 1941, plaintiff had filed an action in the Superior Court of Cook County against International Molded Plastic, Inc., containing a proven count for the wrongful conversion of the same mold referred to in the instant action; that the said attachment action came on for hearing and a judgment in favor was rendered on April 3, 1943, by plaintiff against said International Molded Plastic, Inc., in the sum of \$150, and that on April 14, 1943, a satisfaction of said judgment was filed of record in said action against International Molded Plastic, Inc.; that said judgment and satisfaction of the judgment constitute a bar to the action of plaintiff.

A motion to dismiss was filed with this petition, reasons to which motion were copies of the complaint filed by plaintiff against International Molded Plastic, Inc., the answer of the latter company to said complaint and a copy of the earlier action of plaintiff filed in said latter action. On a hearing of said motion filed on November 12, 1946, the court dismissed the instant action.

On December 3, 1946, plaintiff withdrew the motion to set aside the order of dismissal and prayed for leave to file an amended complaint, a copy of the proposed amended complaint was

4.

attached to the petition. The court denied leave to file the petition.

It was the theory of defendant below and argued here that the judgment in trover in the action brought by plaintiff against International Molded Plastics, Inc., and the satisfaction of that judgment, was a bar to the instant case; that when a judgment in trover is entered with respect to a specific chattel and satisfied, title to said specific chattel - in the instant case the mold in question - becomes vested in the defendant in the trover action, and another trover action cannot lie for the same chattel against a subsequent purchaser from the defendant in the trover action.

With respect to that portion of the complaint seeking to recover in trover for the value of the mold in question, we agree with defendant's position that plaintiff cannot maintain this action. This court, in Hodur v. Cutting, 248 Ill. App. 145, had occasion to pass upon the identical question and reviewed many authorities upon the subject. The conclusion reached in that case sustains the position of defendant.

Plaintiff contends that the trial court should not have dismissed the count in equity included in the complaint for injunction and accounting, resting upon the alleged exclusive right to manufacture and market the radio cabinet of the design created by the mold in question to the same extent as the bankrupt Telex Radio & Television Company. The underlying theory of this count is the unfair trade allegedly indulged in by defendant in violation of plaintiff's claimed rights. Since trover lies only for specific chattels wrongfully converted and not intangibles such as choses in action, Kerwin v. Balhatchett, 147 Ill. App. 561, Illinois Minerals Co. v. McCarty, 318 Ill. App. 423, 430, it follows logically that said judgment in trover can be no bar to the equitable action.





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The question remains whether the count in equity, which the court dismissed, and the proffered amended complaint attached to the motion to vacate the order of dismissal, set up a cause of action entitling plaintiff to the extraordinary remedy of injunction, and accounting, upon the theory of unfair trade. We are satisfied from an examination of the pleadings that they do not set up a cause of action. The purchase from the receiver in bankruptcy was on November 7, 1940. This complaint was not filed until November 5, 1945. There is no allegation that plaintiff during that period manufactured any of the cabinets in question or marketed any of them, or made any preparation to do so, or had any intention of marketing the cabinets. Nor is it alleged how much money or property plaintiff's investment involved. Equity will not interfere by way of injunction in this type of action unless substantial property rights are affected. In the absence of proper averments of fact, the court correctly dismissed the complaint and denied leave to file the proffered amendment.

The judgment of the Superior Court is affirmed.

AFFIRMED.

Niemeyer, P. J., and O'Connor, J., concur.





44157

VILLAGE OF SKOKIE, a Municipal  
Corporation,

Appellee,

v.

THE TRUST COMPANY OF CHICAGO,  
corporation of Illinois, as Trustee  
under the provisions of a Trust Agreement  
dated August 6, 1945, and known as Trust  
No. 4755, A. STENER, Unknown Owners,  
Defendants,

On Appeal of:  
THE FIRST NATIONAL BANK AND TRUST  
COMPANY OF RACINE, a national banking  
association,

Appellant.

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

3331A. 159<sup>1</sup>

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

From an order of the Circuit Court of Cook County, denying a motion of the First National Bank and Trust Company of Racine, hereinafter referred to as petitioner, to intervene in a foreclosure proceeding brought by plaintiff, and for leave to file a motion to vacate the decree of sale, this appeal is taken.

The instant proceeding was filed by plaintiff to foreclose the liens of certain special assessments upon parcels of land described in the complaint. No bondholders were named as parties defendant. After defaults taken, the court on February 21, 1947, entered a decree of foreclosure and sale. This decree was amended on February 27, 1947. On March 21, 1947, petitioner presented its verified petition to intervene, alleging it is the holder of a substantial amount of the special assessment bonds of assessment 60610, included in the foreclosure.

The petition alleged inter alia that it is a banking corporation with its principal place of business in the City of Racine, State of Wisconsin; that the special assessment

VILLAGE OF BOKROS, a Municipal Corporation,  
Appellee,

v.

THE TRUST COMPANY OF ILLINOIS, a Trustee  
corporation of Illinois, as Trustee  
under the provisions of a Trust Agreement  
dated August 8, 1942, and known as Trust  
No. 4732, A. SCHERER, Defendant,  
Defendants,

On Appeal of:  
THE FIRST NATIONAL BANK AND TRUST  
COMPANY OF CHICAGO, a national banking  
association,

Appellant.

MR. JUSTICE FRANKLIN DELANEY and others of the COURT.

From an order of the Circuit Court of Cook County,

denying a motion of the First National Bank and Trust

Company of Chicago, hereinafter referred to as petitioner,

to intervene in a foreclosure proceeding brought by plaintiff,

first, and for leave to file a motion to vacate the decree

of sale, this appeal is taken.

The instant proceeding was filed by plaintiff to

foreclose the loans of certain special assessments upon

parcels of land described in the complaint. As part-

holders were named as parties defendant. First default

taken, the court on February 21, 1947, entered a decree

of foreclosure and sale. This decree was affirmed on

February 27, 1947. On March 21, 1947, petitioner presented

its verified petition to intervene, alleging it is the

holder of a substantial amount of the special assessment

bonds of assessment 60810, included in the foreclosing.

The petition alleged inter alia that it is a partner

corporation with the principal place of business in the City

of Racine, State of Wisconsin; that the special assessment

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roll was confirmed by the County Court of Cook County as to each tract and parcel of land assessed; that said judgment became a lien for the payment of which said special assessment was levied on all of the property to the same extent and of equal force and validity as the lien for general taxes; that plaintiff, in anticipation of the collection of said special assessment, issued its special assessment bonds bearing 6% interest and evidenced by coupons attached; that the village defaulted in the payment of the principal of the bonds issued against said assessment, maturing December 31, 1932, to and including December 31, 1942, and defaulted in the payment of coupons during said period; that some of such defaults in the payment of interest were unnecessary and constituted a voluntary default on the part of the village; that said village has commingled moneys received in sundry installments in said special assessment and has commingled principal and interest in said accounts; that there is pending in the District Court of the United States for the Northern District of Illinois a suit by petitioner against plaintiff and others, filed on July 2, 1943, by which action petitioner sought equitable relief to compel the village to certify to the county collector all installments of special assessments delinquent since 1932, and be enjoined from receiving illegally special assessment bonds or coupons in payment of special assessments as to principal or interest, and that all assessments which may be decreed to be improperly paid in the past by the use of bonds and coupons, not permitted by law, or otherwise improperly paid, may be ordered and directed by the court to be reinstated on the books of the village as unpaid and delinquent and certified as such to the county collector of Cook County, and

roll was confirmed by the County Court at each county to  
to each tract and parcel of land assessed; that said roll  
most because a lien for the payment of said taxes was created  
assessment was levied of all of the property in the county  
extent and of equal force and validity as the laws for  
general taxes; that plaintiff, in satisfaction of the  
collection of said special assessment, issued the warrants  
assessment bonds bearing to interest and said roll of coupons  
attached; that the village defaulted in the payment of the  
principal of the bonds issued against said assessment, to-wit:  
December 31, 1932, to and including December 31, 1933, and  
defaulted in the payment of coupons thereon said bonds; that  
some of such defaults in the payment of interest and coupons  
any and constituted a voluntary default on the part of the  
village; that said village has continued without cessation in  
sundry franchises in said special assessment and has  
commenced principal and interest in said assessment; that  
there is a default in the payment of the said bonds  
for the Northern District of Illinois a bill of foreclosure  
against plaintiff and others, filed on July 1, 1934, by  
which action plaintiff seeks judgment and order to compel  
the village to comply to the county collector and to satisfy  
ments of special assessments delinquent since 1931, and to  
enjoined from receiving illegally levied assessments bonds  
or coupons in payment of special assessments to principal  
or interest, and that all assessments which may be assessed  
to be improperly paid in the past by the roll of bonds and  
coupons, not permitted by law, or otherwise lawfully paid,  
may be ordered and attached by the county to be returned  
on the books of the village as unpaid and delinquent and  
certified as such to the county collector of Cook County, and



3.

an accounting of the entire special assessment No. 60610; that a Lis Pendens notice of the above described suit was served upon the county treasurer, and ex-officio county collector of Cook County, on December 13, 1946, and served on the state's attorney of Cook County; that a judgment was entered in the name of the People of the State of Illinois for the full amount of unpaid installments of principal, interest and costs; that the village failed to file foreclosure proceedings since the year 1932 until the filing of the instant proceeding; that petitioner was not made a party to the instant foreclosure suit nor was any notice given of the filing of same, and petitioner had no notice of it until after decree was entered; that the liens of general taxes against said parcels and special assessments involved in the instant suit are on a parity and equal, with no preference or priority of one over the other; that the complaint did not mention the liens of said unpaid general taxes, and the decree does not dispose of said liens in the sale ordered, contrary to the statute; that a number of suits were brought by respective holders of bonds against said village, said suits being described in said petition, and that judgments were entered in favor of said holders of bonds against said village, all based upon the illegal and improper acts of defendant charged in this petition as well as charged in the petitioner's suit against the village in the United States District Court; that repeated requests and warnings to the village have been made to cease and desist bringing foreclosure actions in its own name pending the outcome of the aforesaid suit in the United States District Court; that likewise repeated warnings have been made as to the legality of procedure used by the village in foreclosure actions such as the case at bar. It prayed to be allowed to intervene

an accounting of the entire record assessment was made; that a his petition notice of the above described suit was served upon the county treasurer, and ex-officio clerk, collector of Cook County, on December 13, 1904, and served on the state's attorney of Cook County; that a judgment was entered in the name of the people of the State of Illinois for the full amount of unpaid assessments of principal, interest and costs; that the village failed to file a return proceedings since the year 1901 until the filing of the instant proceeding; that notwithstanding the fact that party to the instant proceeding said suit was not notice given of the filing of same, and petition was not notice of if until after decree was entered; that the issue of general taxes against said parcels and general assessments levied in the instant suit are on a party and equal, with no preference or priority of one over the other; that the petition did not mention the item of said unpaid general taxes, and the decree does not dispose of said item in the said petition; contrary to the statute; that a number of other very important by respective holders of bonds against said village, and with being described in said petition, and that judgments were entered in favor of said holders of bonds against said village, all based upon the illegal and improper rate of defendant charged in this petition as well as charged in the petitioner's suit against the village in the United States District Court; that repeated requests and petitions to the village have been made to cease and desist bringing these obnoxious actions in its own name pending the outcome of the already suit in the United States District Court; that like the repeated warnings have been made as to the illegality of procedure used by the village in foregoing actions, and as the case at bar. It prayed to be allowed to intervene

4.

as a party defendant and for leave to file a motion to vacate the decree and for such other and further relief as may be required.

No answer was filed to this petition, and upon the face of the petition the court entered an order denying the motion for leave to intervene and for leave to file its motion to vacate the decree.

Petitioner's theory is that the village was a trustee of the special assessments collected, applicable to the special assessment bonds issued by it, and that it had no right to commingle special assessments collected, but its duty was to distribute pro rata the assessments collected applicable to the bonds issued. Rothschild v. Village of Calumet Park, 350 Ill. 330. This contention is supported by the weight of authority but is not sufficient reason for its claimed right to intervene. Petitioner has, if the facts warrant it, a right to an accounting against the village. For that purpose it brought its suit in the Federal court. Nothing has transpired in the instant case to interfere with its remedy in the Federal suit. It was not a necessary party to the instant case, and plaintiff was not under the law required to make it a party.

In Village of Lansing v. Sundstrom, 379 Ill. 121 at page 126, it was said:

"The bonds were sold subject to the provisions of the Local Improvement act, which empowered the municipality to bring the proceeding and did not give the bondholders the right to be made parties."

To the same effect, People v. Anderson, 380 Ill. 158. In People v. Sandvoss, 320 Ill. App. 239 at page 241, it was said:

"With respect to appellant's contention that a bondholder should be made a party to such proceeding, we find that bondholders are not considered necessary parties to an action of foreclosure of special assessment lien."

the device and for such other and further uses as may be required.

The motion to vacate the answer.

The motion for leave to intervene and the leave to file the petition and answer were granted.

No answer was filed by this petition, and the leave to

Settled 1877

of the mental assessment collected, and made in the special assessment bond issue by it, was that it was not right to combine mental assessment collected, but it was to distribute one with the assessment collected to the bond issue. The duty was to distribute one with the assessment collected, but it was to combine mental assessment collected, but it was to distribute one with the assessment collected.

...the right to be heard by the court ...

the remedy in the Federal act. It was held that the remedy in the Federal act was not available to the State, and that the State was not bound to follow the Federal act in this respect.

11 Village of San Jose, California, U.S.A.

... ..

The board were told subject to the approval of the local movement not, with reference to the possibility to enter the movement and to the five the board had the right to make within

[illegible]



It is argued that the instant proceeding was defective and irregular in that the People of the State of Illinois ~~was~~ not joined as a party, since a judgment for the delinquent general taxes had been entered in favor of the State. No case in this State is cited by petitioner and none has been called to our attention where it has been held that the State must be joined as a party to a foreclosure of a special assessment brought by a city or village. The State may consent to be made a party, and such has frequently been the case, but without such consent we know of no rule that would authorize making the State a party. In this connection we must not lose sight of Article IV, section 26 of the Illinois Constitution of 1870, which provides:

"The state of Illinois shall never be made defendant in any court of law or equity."

This provision must control upon this question.

There is suggested in the briefs of petitioner that the village was guilty of bad faith and collusion in the bringing of the instant case. These latter matters do not appear in the petition filed for leave to intervene and are not a part of the record. This subject matter discussed in the brief was introduced in this court by way of affidavit in support of a motion for an extension of time to file briefs and abstracts. We have no right to consider them as substantive matters affecting the merits of this appeal and, therefore, refrain from discussing the facts contained in the affidavit in support of the contention of bad faith now made. An analysis of the petition for leave to intervene fails to disclose any proper charge of fraud, bad faith, or collusion, or neglect of petitioner's rights which could justify the exercise of the court's discretion to allow the intervention by petitioner. The refusal to allow intervention in the instant case was not an abuse of discretion. Petitioner had





6.

notice of the sale pursuant to the decree of sale, and it had every opportunity to protect itself in the bidding at the sale. There was no charge that the sale was not regular and in good faith.

It is also urged by petitioner that the decree properly construed would result in a commingling of the funds realized from the foreclosure sale, the very thing which it is argued is forbidden by the rule in the Rothschild case and other cases. We do not/<sup>so</sup>construe the effect of the terms of the decree.

We think the chancellor did not abuse his discretion in refusing to allow the right to intervene, and the order of the Circuit Court is accordingly affirmed.

AFFIRMED.

Niemeyer, P. J., and O'Connor, J., concur.



44165

ERNEST REHR,  
Appellee,  
v.  
FRANK M. WEST,  
Appellant.

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

333 I.A. 160<sup>1</sup>

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment of the Municipal Court of Chicago in the amount of \$280, in an action for alleged breach of warranty.

Plaintiff employed defendant, a contractor, to lay a cement floor in the basement of plaintiff's residence, at an agreed price of \$290. When the work was completed on or about July 27, 1945, at which time payment of the contract price was made, defendant gave his receipt for payment and wrote on it, "Basement cement floor guaranteed for one year".

Plaintiff's evidence clearly tended to prove that the work was done in an unworkmanlike manner; that there were many cracks in the cement, in places it had buckled, and in some places the cement was all in pieces. The court believed the witnesses for plaintiff and determined there was a breach of the warranty.

Defendant contends that the warranty is indefinite, uncertain and not enforceable, and was not shown to be a part of the original contract, but merely noted on the receipt for payment when the work had already been completed; also that the plaintiff had accepted the work and made no complaint about it until nearly 8 months after its completion.

As to the warranty, we do not agree with defendant's position. No particular words need be employed to constitute

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CHICAGO, ILL. 1941

1. The first step is to identify the problem. This involves understanding the situation and the needs of the people involved. It is important to listen to all sides and to be open to new ideas.

plaintiff expended defendant, a contractor, to lay a cement floor in the basement of plaintiff's residence, at an agreed price of \$250. When the work was completed on or about July 27, 1943, at which time payment of the contract price was made, defendant gave his receipt for payment and wrote on it, "Basement cement floor removed for one year".

[illegible]

about it until nearly a month after its completion. The district had accepted the work and made no complaint. Payment when the work had already been completed; after that of the original contract, but merely noted on the receipt for uncertain and not enforceable, and was not made to me as defendant contrary to the contract in London.

As to the second, we do not have any information.



2.

a warranty if it is clear that the parties intended a warranty. Van Buskirk v. Murden, 22 Ill. 446; Beckett v. Woolworth Co., 376 Ill. 470. The written warranty in the instant case merely limited to one year that which would be regarded as an implied warranty. A contractor who contracts to construct a cement floor, impliedly warrants that it will be performed in a good workmanlike manner.

With respect to the contention that the work had been accepted, and there was a long delay in making complaint, the court in Van Buskirk v. Murden, at page 448, said:

"It is monstrous to say, in reference to plasterer's work, that all defects are waived when such work is accepted without objection and in satisfaction of the contract - all visible defects, or such as could be ascertained by inspection and examination, would be waived, but how can the employer tell, by looking at a smooth coat of plastering, everything fair to the eye, whether the lathing has been done properly, or the mortar well made with due proportions of lime, sand and hair, to give it adhesion, hardness and durability? No man can tell, and therefore it is that the party should not be bound by an acceptance, or acceptance considered as a waiver of latent defects, which too often lurk in plastering, which to the eye appears very fine and unexceptionable."

The same reasoning would apply to the cement floor in the instant case.

There is, however, in this record, a total lack of proof of damages. The proper measure of damage for a breach of this type of warranty would be the reasonable cost of repairing the alleged defects in the cement flooring. Plaintiff was allowed as damages, the contract price, which is not the measure of damage. There was no witness who gave any opinion as to cost, nor any evidence that the repairs necessary were made, or what they cost. Mason v. Griffith, 281 Ill. 246, 256.



3.

For the reason indicated the judgment is reversed and the cause remanded to the Municipal Court of Chicago for further proof as to damages, and proceed in harmony with the views herein expressed.

REVERSED AND REMANDED  
WITH DIRECTIONS.

Niemeyer, P. J., and O'Connor, J., concur.

For the reason indicated the judgment is reversed and the cause remanded to the District Court of Appeals for further proceedings to be had, and it is so ordered with the above herein expressed.

Very truly yours,  
J. H. H. H.

Attest, J. H. H. H., and J. H. H. H., clerks.

44175

ANTOINETTE FALOZZOTTO,  
Appellee,

v.

CHICAGO TRANSIT AUTHORITY, a  
Municipal Corporation,  
Appellant.

24 A  
APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

3382A 160<sup>2</sup>

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiff brought suit in the Superior Court of Cook County, against defendant, for personal injuries, alleging negligence of defendant in the operation of one of its street cars. A trial with a jury resulted in a verdict for plaintiff for \$4500.00. After motions for a new trial and for judgment notwithstanding the verdict and in arrest of judgment were overruled, judgment was entered for plaintiff, from which defendant appeals.

Plaintiff admittedly was a passenger on defendant's street car. She claims that the car came to a full stop when she was alighting, and that it started before she had a reasonable opportunity to alight, thus throwing her and injuring her. Two other eye witnesses corroborate her in her claim that the street car had come to a full stop before she alighted. On the other hand, witnesses for defendant testified that the car was in motion when plaintiff was in the act of alighting. On this issue there was a sharp conflict in the evidence, which made it clearly a question of fact for the jury. We cannot, upon the review of the evidence, say that the verdict of the jury on this issue was against the manifest weight of the evidence. Read v. Cummings, 324 Ill. App. 607; Elmore v. Cummings, 321 Ill. App. 234.

It is next urged by defendant that the court erred in refusing to strike out the testimony of plaintiff as to the



ATTORNEY AT LAW  
 JAMES H. HARRIS  
 1000 15th St. N.W.  
 WASHINGTON, D.C.

v.

UNITED STATES AUTOMOBILE  
 LIABILITY CORPORATION  
 1000 15th St. N.W.  
 WASHINGTON, D.C.

MR. JUSTICE FELDER DELIVERED THE VERDICT OF THE COURT.

Plaintiff brought suit in the Superior Court of King County, against defendant, for personal injuries, alleging negligence of defendant in the operation of one of its cars. A trial with a jury resulted in a verdict for plaintiff for \$4500.00. After motions for a new trial and for judgment notwithstanding the verdict and in arrest of judgment were overruled, judgment was entered for plaintiff, from which defendant appeals.

Plaintiff admittedly was a passenger on defendant's street car. She claims that the car came to a full stop when she was alighting, and that it started before she had a reasonable opportunity to alight, thus throwing her and injuring her. Two other eye witnesses corroborate her claim that the street car had come to a full stop before she alighted. On the other hand, witnesses for defendant testified that the car was in motion when plaintiff was in the act of alighting. On this issue there was a sharp conflict in the evidence, which made it largely a question of fact for the jury. We cannot, upon the review of the evidence, say that the verdict of the jury on this issue was against the manifest weight of the evidence. Read v. Cummings, 204 Ill. App. 607; Wimors v. Cummings, 231 Ill. App. 234.

It is next urged by defendant that the court erred in refusing to strike out the testimony of plaintiff as to the

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amount she paid the hospital and what she had paid her doctors. The bills rendered her were offered in evidence, and on objection by defendant were excluded. The attending physician testified as to the amount of his bill. No objection was made to the above testimony at the time it was given. Only after the testimony was closed on both sides, the defendant made the motion to exclude and strike out the testimony of the plaintiff and the attending physician regarding the medical bills and expenses. The court overruled the objection, and it is now assigned for error.

In Chicago Union Traction Co. v. May, 221 Ill. 530, the Supreme Court held, at p. 535, a motion to strike out evidence is properly denied where admitted without objection or any promise on part of plaintiff's counsel as to supplemental evidence. A failure to object to evidence at all or at a proper time or in a proper manner waives right to subsequently question admissibility of the evidence.

Defendant argues that the verdict is excessive. Plaintiff, about the age of 55 years at the time of the accident, was earning \$20.00 a week as a nurse maid. The evidence tends to prove that plaintiff, in the accident, was hurled into the street on her face, suffered loss of blood, was in the hospital for 3 days, packed in ice, suffered contusions and bruises, a facial scar, injuries to her hand and knee, and her hearing was affected by the injury; that she was unable to continue in her employment; that she was in good health prior to the accident. The attending physician gave it as his opinion that the condition complained of involving her hearing and injury to the hand was a permanent condition. What this court recently said in Ford v. Friel, 330 Ill. App. 136, is against this contention of defendant.

amount she paid the hospital and what she had paid her doctors. The bills rendered her were offered in evidence, and an objection by defendant was excluded. The attending

physician testified as to the amount of his bill. No objection was made to the above testimony at the time it was given. Only after the testimony was closed on both sides, the defendant made the motion to exclude and bring out the testimony of the plaintiff and the attending physician regarding the medical bills and expenses. The court overruled the objection, and it is now admitted for review.

In Chicago Union Trucking Co. v. Ill. Bell Tel. Co., 330 Ill. 330, the Supreme Court held, at p. 333, a motion to exclude evidence in property claims cases should be made at the time or any protest on part of plaintiff's counsel as to material evidence. A failure to object to evidence at any or at a proper time or in a proper manner renders it admissible. Subsequently, defendant's counsel made a motion to exclude the evidence, and the court is of the opinion that the objection is timely.

Plaintiff, about the 1st of 1933, was injured in an accident, was carrying \$10.00 with her at the time. The evidence tends to prove that plaintiff, in the accident, was hurled into the street on her back, sustained loss of blood, was in the hospital for 7 days, treated in the hospital, contusions and bruises, a lacerated scalp, injured in her back and knee, and her hearing was affected by the accident; that she was unable to continue in her employment; that she was in good health prior to the accident. The attending physician gave it as his opinion that the condition complained of involving her hearing and injury to the back was a permanent condition. That this court recently said in Ill. App. 330 Ill. App. 120, it reversed this conviction of defendant.

3.

The complaint made about instruction 18 for plaintiff, wherein the jury was told that in determining the amount of damages it could take into consideration "all monies which the plaintiff has necessarily expended, if any, and the bills which she necessarily became liable to pay, if any, in being treated for such injuries", is without merit, since the evidence as to her outlay and expense incurred in being treated for such injuries was properly admitted. There was, therefore, a sufficient foundation for the giving of this instruction.

We see no reason for disturbing the judgment. It is, therefore, affirmed.

JUDGMENT AFFIRMED.

Niemeyer, P. J., and O'Connor, J., concur.

The complaint made about the condition of the glass, wherein the fact was told that in removing the same of damaged it could have been easily repaired, it was, and which the plaintiff in his deposition stated, it was, and the bill which was presented to him, it was, any, is being treated for such injuries, is being treated since the evidence as to the value of the same is being treated for such injuries and is being treated, and, therefore, a sufficient foundation for the giving of this instruction.

It was the reason for the instruction, it is, therefore, affirmed.

THE COURT AFFIRMS.

Witness, E. J. ... ..



44227

THOMAS AMBROSE,  
Appellee,

v.

D. C. DOYLE, d/b/a DOYLE FREIGHT  
LINES and STEVE SINGLETON,  
Appellants.

25 A  
APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

335 I.A. 161<sup>1</sup>

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

From a verdict and judgment in favor of plaintiff, against defendant, in an action for personal injuries, defendant appeals.

The accident, resulting in injuries to plaintiff, occurred in the intersection of Archer Avenue and Throop Street in Chicago. It involved a collision between plaintiff's automobile and defendant's truck. There is no question raised as to the injuries nor the size of the verdict. Defendant asks for a reversal of the judgment upon the grounds that the verdict is against the manifest weight of the evidence, the refusal of the court to direct a verdict in favor of defendant at the close of all the evidences, and the refusal of the court to grant defendant's motion for judgment notwithstanding the verdict or to grant a new trial.

Many witnesses testified on both sides, and the record discloses a sharp conflict in the testimony, principally relating to whether the green traffic light was with the plaintiff when he entered the intersection or whether the green light was with the defendant when defendant's truck entered the intersection.

Upon the state of this record, as we view the evidence, the questions respecting alleged contributory negligence on

THOMAS ARNOLD,

Defendant,

v.

D. C. BOYLE, AKA WHITE MALLIN  
 LINDS and JOHN LINDS  
 Plaintiffs.

SHIRLEY BOYLE  
 LINDS, MOTHER  
 JOHN LINDS

ALL JUSTICE BETWEEN DEFENDANT AND PLAINTIFFS.

From a verdict and judgment in favor of plaintiff,  
 against defendant, in an action for personal injuries,  
 defendant appeals.

The accident, resulting in injuries to plaintiff,  
 occurred in the intersection of public roads and highways  
 at or near Chicago. It involved a collision between plaintiff's  
 automobile and defendant's truck. There is no  
 question raised as to the liability for the accident or the  
 verdict. Defendant asks for a reversal of the judgment  
 upon the ground that the weight of the evidence is in  
 favor of the defendant, the refusal of the court to direct  
 a verdict in favor of defendant at the close of all the  
 evidence, and the refusal of the court to grant defendant's  
 motion for judgment notwithstanding the verdict is to  
 grant a new trial.

Many witnesses testified on both sides, and the  
 record discloses a sharp conflict in the testimony, particularly  
 relating to whether the green traffic light was seen by  
 plaintiff when he entered the intersection at which the  
 green light was with the defendant's truck.

Upon the state of this record, as set out in the evidence,  
 the questions respecting alleged contributory negligence on

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the part of the plaintiff or alleged negligence of the defendant were questions squarely for the jury to determine.

We are asked to hold that the verdict and judgment are against the manifest weight of the evidence.

We said in Schneiderman v. Interstate Transit Lines, Inc., 331 Ill. App. 143:

"The determination of such a question in any case involves a grave responsibility, which we are in duty bound to squarely meet and carefully discharge."

In that connection this court in Norkevich v. Atchison, T. & S. F. Ry. Co., 263 Ill. App. 1, at p. 15, said:

"There are many things which a jury observes on the trial in such case that do not appear from the printed record---the appearance of the respective witnesses, their manner of testifying and a great many other circumstances. They are in a much better position in such case to determine the truth of the matter in controversy than a court of review.' \* \* \* Under the law we cannot disturb the verdict of the jury unless it is clearly against the manifest weight of the evidence. Manifest means clearly evident, clear, plain, indisputable." (Italics ours.)

We think the evidence amply supports plaintiff's claim and the judgment of the Circuit Court is not against the manifest weight of the evidence. Accordingly it is affirmed.

AFFIRMED.

Niemeyer, P. J., and O'Connon, J., concur.



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BERNARD DOMBROWSKI, EDITH WOLANIN,  
and HELEN HALLORAN,

Appellees,

v.

FELIX VON BRONK, Executor, MARTHA  
VON BRONK, WALTER DOMBROWSKI,  
BRANK DOMBROWSKI and AGNES KORUP,

FELIX VON BRONK, Executor, MARTHA  
VON BRONK,

Appellants.

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APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

33511.161

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint in chancery to set aside the probate of an instrument and to decree that it be declared null and void and not the last will and codicil of Frank Dombrowski, deceased. There was a jury trial and a verdict finding that the writing purporting to be the last will of Frank Dombrowski was not his last will, a decree was entered on the verdict and two of the defendants, Felix Von Bronk, executor, and Martha Von Bronk, prosecute this appeal.

The record discloses that on January 6, 1941, Frank Dombrowski, who was then about 86 years old, executed his will and on August 26, 1941, a codicil thereto; he died October 21, 1944. The will and codicil were admitted to probate by the Probate court of Cook county December 13, 1944, and on February 14, 1945, the present suit was instituted.

April 5, 1941, the three plaintiffs, children of Frank Dombrowski, filed their verified petition in the Probate court of Cook county, alleging that their father, Frank Dombrowski, because of old age, physical incapacity and mental deterioration, had become incompetent and was



BERNARD DOMBROWSKI, with wife  
and HELEN KATZ,  
Appellees.

FELIX VON BROCK, executor, PLAINTIFF  
VERSUS  
FRANK DOMBROWSKI and HELEN KATZ,  
Defendants.

FELIX VON BROCK, executor, PLAINTIFF  
VERSUS  
FRANK DOMBROWSKI and HELEN KATZ,  
Defendants.

THE JUSTICE OF THE PEACE FOR THE COUNTY OF ...  
Plaintiff filed a complaint in equity to set aside  
the probate of an instrument and to declare that it be  
declared null and void and not the last will and codicil  
of Frank Dombrowski, deceased. There was a jury trial and  
a verdict finding that the writing purporting to be the last  
will of Frank Dombrowski was not his last will, a decree was  
entered on the verdict and two of the defendants, Felix  
Von Brock, executor, and Helen Katz, wife of Frank Dombrowski,  
appeal.

The record discloses that on January 5, 1941, Frank  
Dombrowski, who was then about 40 years old, executed his  
will and on August 25, 1941, a codicil thereto; he died  
October 21, 1944. The will and codicil were admitted to  
probate by the Probate Court of Cook County December 15,  
1944, and on February 14, 1945, the present suit was instituted.  
April 5, 1941, the three plaintiffs, children of  
Frank Dombrowski, filed their verified petition in the  
Probate Court of Cook County, alleging that their father,  
Frank Dombrowski, because of old age, physical infirmity  
and mental deterioration, had become incompetent and was

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therefore incapable of managing his person and estate, and praying that a conservator be appointed. The case was heard, the petition dismissed and an appeal prayed to the Circuit court of Cook county. The Probate court refused to fix the bond, holding that the petitioners had no right to appeal. Afterwards they filed their petition in the Circuit court of Cook county praying that a writ of mandamus issue to compel the Probate Judge to grant the appeal and to fix the amount and conditions of the appeal bond. The Probate Judge filed a motion to strike the petition on the ground that the parties seeking the appeal had no appealable interest. The motion was allowed, the petition dismissed and an appeal taken to the Supreme court where the judgment of the Circuit court was reversed and the cause remanded with directions to overrule the Probate Judge's motion to strike. People v. O'Connell, 378 Ill. 346. The appeal from the Probate court was afterwards perfected and there was a jury trial and two verdicts returned finding Frank Dombrowski to be an incompetent person, incapable of managing and controlling his person and estate, and that he was aged about 83 years. Judgment was entered on the verdicts from which Frank Dombrowski prosecuted an appeal to this court where the judgment was affirmed by another Division of this court. En Re Estate Frank Dombrowski Alleged Incompetent Person, Frank Dombrowski, Appellant, 321 Ill. App. 300, (Abst.)

Plaintiffs, Bernard Dombrowski, Edith Wolanin and Helen Halleran, children of Frank Dombrowski, deceased, in their complaint to set aside the probate of the will and to have it declared null and void, charged undue influence by Martha Von Bronk, a daughter of the deceased, and her husband,



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Felix Von Bronk, who was also named as trustee and executor of the will, and the complaint also charged that Frank Dombrowski was incapable of making a valid will. At the close of plaintiff's evidence, they withdrew the charge of undue influence and the cause was submitted to the jury on the issue of the testamentary capacity of the deceased. The instant case went to trial on December 11, 1946.

Frank Dombrowski, the deceased, was born in Danzig, Germany or Poland. He never learned to read or write and came to the United States more than 50 years ago. Subsequently he returned to Europe was there married and brought his wife to America. He lived for 13 years in Chicago and then moved to Calumet City; he was a hod-carrier by trade. About 20 years before he executed the alleged will he suffered a cerebral thrombosis which caused him to retire. Afterwards his wife, Lucy Dombrowski, managed his affairs, business and personal. She died in July, 1940. After the mother's death his daughter, Edith, one of the plaintiffs, assumed the management of his property and person for about 8 months. Afterwards another daughter, Martha, one of the defendants, took charge of her father and his affairs, and in January, 1941, drove him to the attorney's office in South Chicago, where the will was drawn and executed. Practically all of his property consisted of two pieces of real estate and three mortgages, and was worth about \$34,000. The will provided that after the payment of debts, all the property was devised and bequeathed to his son-in-law, Felix Von Bronk, one of the defendants, in trust. The trustee was directed to take possession of the personal and real property, collect the income, sell or lease or convey any or all of it; that the purchaser or lessee or mortgagee was not obliged to look to the application of the proceeds. There was a further pro-



Felix Von Brock, who was also known as Alexander and sometimes  
 of the will, and the complaint filed covering the same  
 Brockman was living at the time of the will. At the  
 close of plaintiff's evidence, they withdrew the same  
 of undue influence and the case was submitted to the jury  
 on the issue of the testamentary capacity of the testator.  
 The instant case was set for trial on December 11, 1934.  
 Frank Brockman, the testator, was born in Russia,  
 Germany or Poland. He never learned to read or write and  
 came to the United States more than 20 years ago. Subsequently  
 he returned to Europe and there married and owned his  
 wife to America. He lived for 12 years in Europe and then  
 moved to Calumet City; he was a non-reading or illiterate.  
 20 years before he executed the will, he was employed as  
 several tinopans which caused him to travel. Brockman and  
 his wife, Lucy Brockman, owned his estate, business and  
 personal. She died in July, 1930. After the mother's death  
 his daughter, Edith, one of the plaintiffs, assumed the  
 management of his property and a few days before his death  
 after his death, Edith, one of the defendants,  
 took charge of his father and his estate, and in January,  
 1934, drove him to the attorney's office in Cook County,  
 where the will was drawn and executed. Subsequently all of  
 his property consisted of two pieces of real estate and  
 three mortgages, the one worth about \$5,000. The will  
 provided that after the payment of debts, all the property  
 was devised and bequeathed to his son-in-law, Felix Von Brock,  
 one of the defendants, in trust. The trustee was directed  
 to take possession of the personal and real property, collect  
 the income, sell or lease or convey any or all of it, and  
 the purchaser or lessee or mortgagee was not allowed to look  
 to the application of the proceeds. There was a further pro-



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vision that the trustee might exchange the real estate for other real estate, reinvest the proceeds, etc., and at the end of seven years, the trustee was given sole power when distribution should be made and upon the termination of the trust, the trustee was to pay \$2,000 to Walter Dombrowski, \$2,000 to Bernard Dombrowski and \$2,000 to Martha Von Bronk, and in case Bernard died before the termination of the trust, the trustee should pay Bernard's share to the children of the Von Bronks then living, and in case Walter died before the termination of the trust, to turn Walter's share over to his children Frank and Agnes Dombrowski, Jr. The rest and residue of the estate were given to Martha. Her husband, Felix Von Bronk, was named executor without bond. There was a further provision that if any one of the children should institute any proceedings to contest the legality of the will, they should receive nothing. The executor and trustee was directed to donate \$500 for Masses for the repose of the soul of Frank Dombrowski and the souls of other designated relatives, and there was a further provision that: "I have taken into consideration my beloved daughters, Helen Halloran and Edith Wolanin, and for reasons personal to myself, I direct that they receive nothing." The testator signed his name by making his mark. Three persons signed the will as witnesses.

As hereinbefore stated, on April 5, 1941, which was three months after the will was executed, the petition for a conservator was filed in the Probate court by Helen, Edith and Bernard and after a hearing denied by that court June 4, 1941. August 26, 1941, Frank Dombrowski executed a codicil whereby, after the termination of the trust mentioned in the will, the trustee was directed to pay Marth Von Bronk \$3,000 and Walter Dombrowski \$3,000. The \$2,000 the trustee was

vision that the trustee might exercise the real estate for other real estate, subject to the proceeds, etc., and at the end of seven years, the trustee was given the power when distribution should be made and over the termination of the trust, the trustee was to pay \$5,000 to Walter Dombranski, \$5,000 to Bernard Dombranski and \$5,000 to Martha Von Brock, and in case any of them died before the termination of the trust, the trustee should pay to the children of the deceased living, and in case Walter died before the termination of the trust, to the children's share over to his children from his other children. The rest and residue of the estate was given to Walter. Her husband, Felix Von Brock, was named executor without bond. There was a further provision that if any one of the children should institute any proceedings to contest the validity of the will, they should receive nothing. The executor and trustee was directed to deposit \$500 for the repose of the soul of Felix Dombranski and the souls of other designated relatives, and there was a further provision that: "I have known and considered my beloved daughters, Helen Kallman and Edith Wolfson, and my son, personal to myself, I direct that they receive nothing." The testator signed his name by writing his name. Three persons signed the will as witnesses.

The testator died, on April 6, 1941, which was three months after the will was executed. The petition for a conservator was filed in the probate court of Salem, Oregon, and after a hearing denied by that court June 4, 1941. August 26, 1941, Frank Dombranski obtained a writ whereby, after the termination of the trust mentioned in the will, the trustee was directed to pay to each of them \$5,000 and Walter Dombranski \$3,000. The \$5,000 the trustee was

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directed by the will to pay Bernard was eliminated. The codicil contained the following: "I have taken into consideration the fact that the following of my children; Bernard Dombrowski, Edith Wolanin and Helen Halloran, have within the past year caused me considerable expense and grief in their unfair attempt to have me adjudged an incompetent person. For this, and for reasons personal to myself, I direct that they receive nothing." The codicil was signed by Frank Dombrowski, by his mark, and witnessed by four persons.

At the time of the execution of the will in the office of the attorney in South Chicago, the testator, Frank Dombrowski, executed two quit claim deeds, by one of which he conveyed to "Helen R. Cmar, A Spinster," who was secretary of the attorney, lots 13, 14 and 15, of a certain subdivision and the other, lots 24 and 25 in block 29 of another subdivision, all in Cook county, Illinois, which was all the real estate he owned. Immediately thereafter Miss Cmar conveyed the property by two quit claim deeds to Frank Dombrowski, the testator, and Martha Von Bronk, his daughter, not as tenants in common but as joint tenants.

April 26, 1941, a little more than three months after the execution of the will the testator sold to Catherine B. Schultz, a mortgage he owned, for \$3,000. Checks given in payment are also in evidence and endorsed to the order of the testator and bear his endorsement together with Felix Von Bronk and Abe Fox.

June 23, 1941, Frank Dombrowski, the testator, by his mark as trustee, executed a release deed to the defendants, Felix Von Bronk and Martha, his wife, by which he released a mortgage on their property given to him by the Von Bronks for \$5,500, dated August 6, 1933, due 5 years after date,

directed by the will to pay Lawrence was also intended. The codicil contained the following: "I have taken into consideration the fact that the following of my children, Bernard Dombrowski, Edith Wolanski and Helen Schuler, have within the past year caused considerable expense and grief in their unfair attempt to have me declared an incompetent person. For this, and for reasons mentioned in myself, I direct that they receive nothing." The will was signed by Frank Dombrowski, my son, and witnessed by four persons.

At the time of the execution of the will in the office of the attorney in South Chicago, the testator, Frank Dombrowski, executed two quit claim deeds, one of which he conveyed to Helen H. Omer, a daughter, who was presently of the attorney, lots 12, 14 and 15, of certain subdivision and the other, lots 24 and 25 in block 10 of another subdivision, all in Cook County, Illinois, which was all the real estate he owned. Immediately thereafter the testator conveyed the property of the quit claim deeds to Frank Dombrowski, the testator, and Helen H. Omer, his daughter, not as tenants in common but as joint tenants.

April 26, 1941, a little more than three months after the execution of the will the testator said to Lawrence E. Schuler, a mortgage he owned, lot 2, block 10, which was also in evidence and attached to the other of the testator and bear his endorsement together with Felix Von Brock and the Fox.

June 23, 1941, Frank Dombrowski, the testator, by his mark as trustee, executed a release deed to the defendant, Felix Von Brock and Helen, his wife, by which he released a mortgage on their property given to him by the Fox brothers, for \$2,800, dated August 8, 1935, due 8 years after date,



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and interest coupons evidencing the semiannual interest due on this mortgage, are also in the record marked "cancelled."

December 1941, almost 11 months after the making of the will, the testator sold another mortgage for \$4,000 which he owned. The check for this mortgage was made payable to the testator and endorsed by him and Martha Von Bronk.

Most of the foregoing facts, except those that have to do with the execution of the will and codicil, are set forth in the opinion filed January 1, 1944, hereinabove referred to of Mr. Justice Friend, of the Second Division of this court. Many other things are there discussed in detail, a few of which are: In speaking of the sale of the \$3,000 and \$4,000 mortgages, the opinion says that "Both Martha and her husband testified that proceeds of these sales were turned over to respondent [Frank Dombrowski, the testator] and that they did not see them afterward. Nevertheless both checks were indorsed by the Von Bronks and the proceeds evidently were retained by them. One check for \$4,000 was traced to the personal account of Martha and her husband in the East Side Trust and Savings Bank. In June 1941 a mortgage of the Von Bronk property given to secure the payment of a note in the amount of \$5,500, executed by the Von Bronks, was released and the note canceled. Petitioners [plaintiffs here] contend that this note and mortgage were taken by Martha from the personal effects of her father and a release thereof effected without payment of any consideration." Felix Von Bronk testified that this was a "dummy" mortgage -- was never held by the testator.

The court there further says that the record consists of more than 800 pages and the jury heard some 50 witnesses, including a number of experts, etc. And continuing: "He [Frank Dombrowski] appeared at the trial 'in a wheel chair, on a



and interest coupons evidencing the loan made to the  
and on this mortgage, are also in the record books  
called."

December 1911, almost if not after the date of  
the will, the testator sold another mortgage for \$500,  
which he owed. The check for this mortgage was cashed  
to the testator and endorsed by him and given to the  
last of the foregoing facts, from those facts  
to no with the execution of the will and estate, and  
last in the opinion filed January 1, 1912, defendant stated  
to of Mr. Justice Tolson, of the Supreme Court of this  
court. Many other things are found in the record, a  
few of which are: It appeared in the will of Jan. 1, 1900 and  
\$4,000 mortgage, the opinion says that "some money was paid  
and said testified that some of it was paid to the  
over to respondent [Frank Dombrowski, the testator] and that  
they did not see them after that. Respondent told them  
were indexed by the Jan. 1, 1900 and the various witnesses  
were retained by them. The check for it was cashed and  
the personal account of Tolson and was retained in the last  
Side Trust and Savings Bank. In June 1911 a mortgage of the  
for Frank property given to a mortgage for \$4,000 and it  
the amount of \$1,500, executed by the testator, was retained  
and the note cancelled. Testimony [Tolson's] a great amount  
that this note and mortgage were taken up after the testator  
actual effects of the estate and a witness [Tolson] stated  
without payment of any consideration." This was found  
testified that this was a "dummy" mortgage -- was never paid  
by the testator.

The court there further says that the record consists of  
more than 800 pages and the jury heard some 10 witnesses,  
including a number of experts, etc. And concluding: "The [Frank  
Dombrowski] appeared at the trial in a wheel chair, on a

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stretcher in a semi-reclining position.' The record leaves no room for doubt that he was so physically incapacitated as to be unable to look after his person." With respect to his mental competency the evidence was about evenly divided. It was in sharp conflict, and continuing, the court said: "From a careful examination of the record we are satisfied that the verdict is amply sustained by the evidence." The court then, after after discussing in detail the contentions made, said: "In conclusion it should be noted that prior to Lucy Dombrowski's death, she owned the mortgages and real estate belonging to her and respondent in joint tenancy with him, and of course respondent became the sole owner thereof upon the death of his wife. Petitioners' counsel argue, with considerable force, that in order to align one of the members of the family on her side of the controversy, Martha Von Brohk caused the preparation of a will which purported to bequeath and devise to her brother Walter Dombrowski one-half of respondent's estate upon his death, and that Walter, in expectation of the inheritance, joined Martha in opposing the appointment of a conservator, notwithstanding the fact, of which he was unaware until the date of the trial, that Martha had, through the conveyances heretofore recited, already possessed herself of her father's property, and that upon his death there would be nothing upon which the will might operate."

On the trial of the case before us, over objection of the defendants' counsel, plaintiffs introduced in evidence the verdicts of the jury rendered in the conservator proceedings but not the judgment thereon, and at that time they were read by counsel, to the jury. One of the verdicts is:

"We the undersigned jurors in the case of Frank Dombrowski, alleged to be an incompetent person, having heard the evidence in the case, find from such evidence that the said Frank Dombrowski is incapable of managing and controlling

stranger in a well-known building. The two men

no room for doubt that he was so obviously intimidated

as to be unable to look after his person. With respect

to his mental competency the evidence was almost evenly

divided. It was in sharp conflict, and conflicting, the

court said: "There is a special examination of the body and

are satisfied that the verdict is well sustained by the

evidence." The court then, after a brief discussion of certain

the confessions made, said: "In considering it should be noted

that prior to Lady Dombrowski's death, she owned the property

and real estate belonging to her and was competent in mind

tenancy with him, and it cannot reasonably be said that

owner thereof upon the death of the wife. The court then, counsel

argue, with considerable force, that in order to allow the

of the members of the family on the side of the respondent,

Martha von Frank caused the preparation of a will which

purported to be made and devised to her daughter, and which

one-half of respondent's estate went to her, and was valid,

in expectation of the inheritance, and which was in violation

the appointment of a conservator, notwithstanding the fact,

of which he was unaware until the date of the will, that

Martha had, through the conservator, received, already,

possessed herself of her father's property, and that soon after

death there would be nothing more which she could dispose of.

On the trial of the case before us, the objection of

the defendant's counsel, plaintiff introduced as evidence

the verdicts of the jury rendered in the comparative proceedings

ings but not the judgment thereon, and it is clear that they were

read by counsel, to the jury. One of the verdicts is:

"As the undersigned jurors in the case of Frank

Dombrowski, alleged to be an incompetent person, having been

the evidence in the case, find that the evidence that the

said Frank Dombrowski is incapable of managing and disposing of

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his person." The other:

"We, the undersigned jurors in the case of Frank Dombrowski, alleged to be an incompetent person, having heard the evidence in the case, find from such evidence that the said Frank Dombrowski is an incompetent person; that he is a resident of said Cook County, and is incapable of managing and controlling his estate."

After the reading of these two verdicts the plaintiffs rested and defendants then put in their evidence. A number of witnesses were called and testified. After the defendants rested they discussed certain matters outside of the presence of the jury whereby counsel for plaintiffs stated he would withdraw the charges of undue influence as alleged in the amended complaint. The jury were then recalled and counsel for defendants then, over objection of counsel for plaintiffs, introduced in evidence <sup>the</sup> judgment of the Probate court entered June 4, 1941, in the proceeding for the appointment of a conservator, which is as follows: "This cause coming on to be heard on the petition for the appointment of a conservator for Frank Dombrowski, respondent herein and the Court having heard the evidence and now being fully advised in the premises,

"It is hereby ordered that said petition be and the same is hereby denied." Thereupon counsel for plaintiffs without objection introduced in evidence the order and judgment entered by the Circuit court of Cook county on appeal from the Probate court by which a conservator was appointed. That order and judgment recites the two verdicts above quoted, followed by the judgment of the court on the verdicts in which it was adjudged "That Frank Dombrowski be and is hereby adjudged an incompetent person; that he is incapable of managing and controlling his estate; and that said Frank Dombrowski is



his certain. The other:

"... the witness... in the case of...  
 ... alleged to be an...  
 ... heard the evidence in the case, and...  
 ... that the said...  
 ... that he is a resident of...  
 ... of managing and controlling his estate."

After the reading of these two...  
 ... and...  
 ... of witnesses were called and...  
 ... asked they...  
 ... of the jury whereby counsel for...  
 ... withdrew the charges of...  
 ... answered... The jury were...  
 ... for defendant then, over objection of counsel for...  
 ... introduced in evidence...  
 ... June 4, 1911, in the proceeding for the...  
 ... conservator, which is as follows: "This case...  
 ... be heard on the petition for the...  
 ... for Frank...  
 ... heard the evidence...  
 ... "It is hereby ordered that...  
 ... is hereby denied."...  
 ... objection...  
 ... by the circuit court of...  
 ... court by which a conservator was...  
 ... judgment...  
 ... the judgment of the court...  
 ... adjudged "that Frank...  
 ... an incompetent person; that he is...  
 ... controlling his estate; and that said Frank..."



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incapable of managing and controlling his person," and appoints a conservator of the estate of Frank Dombrowski.

Counsel for defendants contend that "The evidence of the finding that the testator was incompetent twenty-three months after the execution of the will was not proper," on the ground that it was too remote, and counsel say that: "The court admitted a certified copy of the decree of the Circuit Court entered on December 4, 1942 finding that the testator was incompetent;" that the verdict of the jury in that case was incorporated in the decree and the verdict entered "twenty-three months after the execution of the will on January 6, 1941. \*\*\*

"It is the contention of the defendants that the verdict of the Circuit Court was too remote in point of time to determine the mental capacity of the testator twenty-three months before." In support of this counsel cite Pittard v. Foster, 12 Ill. App. 132. In that case a bill was filed seeking to have the will declared null and void. The court in considering the question whether the verdict of the jury rendered in a proceeding to appoint a conservator was permissible said: "We do not regard the issues formed in the county court in the proceeding to have a conservator appointed necessarily involved the same questions that are necessary to be determined in settling the mental capacity to make a valid will." And that to make such verdict and judgment in such a proceeding admissible, proof would be required beyond the record to show what the issue and the proofs were.

In the instant case we have the opinion of another Division of this court from which it clearly appears that the issues were substantially the same in that proceeding as the issues are in the case before us -- the evidence in both

incapable of managing and controlling his person," and appoints a conservator of the estate of such person.

Counsel for defendant contended that "the evidence in the finding that the testator was incompetent twenty-one months after the execution of the will was not proper," and the ground that it was in remote, and of great weight. "The court admitted a certified copy of the record of the Circuit Court entered on December 4, 1941, showing that the testator was incompetent;" that the verdict of the jury in that case was incorporated in the record and the verdict entered "twenty-three months after the execution of the will on January 6, 1941." \*\*\*

"It is the contention of the defendant that the verdict of the Circuit Court was too remote in point of time to determine the mental capacity of the testator twenty-one months before." In support of this contention State v. Foster, 12 Ill. App. 132. In that case a bill was filed seeking to have the will declared null and void. The court in considering the question whether the verdict of the jury rendered in a proceeding to appoint a conservator was admissible said: "We do not regard the issue joined in the present

court in the proceeding to have a conservator appointed necessarily involved the same question that was necessary to be determined in settling the mental capacity to make a will. And that to make such verdict and judgment in such a proceeding admissible, proof would be required beyond the record to show what the issue and the proof were.

In the instant case we have the opinion of majority Division of this court from which it clearly appears that the issues were substantially the same in that proceeding as the issues are in the case before us -- the evidence in both

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proceedings is substantially the same, except as to mental ability to make a will.

In Holliday v. Shepherd, 269 Ill. 429, it was held proper to permit the verdict of the jury which was rendered one month before the will was executed, to be received in evidence. The court said (p. 434): "The verdict of the jury upon which the appointment of the conservator was based found that McKinney was insane. In view of the history of this man as shown in this record, from the time of his boyhood, the record of the county court as to the appointment of a conservator for McKinney in 1893 was admissible, not as conclusive on the question of insanity, but to be considered by the jury for what it was worth. If the proof in this record had shown that the conservator was appointed for the sole reason that McKinney was a spendthrift or a drunkard a different question as to the admissibility of the county court record would be presented."

On the question of the remoteness of the verdicts and judgment hereon it must be borne in mind that the proceedings were brought in the Probate court for the appointment of a conservator April 5, 1941, three months after the will was executed and that the delay in having this issue disposed of finally, was caused by the defendants in contesting the petitioners' right to have the judgment of the Probate court reviewed by the Circuit court, and it was not until November 24, 1941, that the Supreme court reversed the Circuit court and Probate Judge and ordered a writ of mandamus to compel a review of the judgment of the Probate court. This review was not finally disposed of until January 18, 1944 when the opinion was filed by another Division of this court, as above stated, affirming the judgment of the Circuit court.

proceedings is substantially the same, except as to details.

ability to make a will.

In Holliday v. Holliday, 205 Ill. 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

proper to permit the verdict of the jury which was returned

one month before the will was admitted, to be received in

evidence. The court said (p. 434): "The verdict of the

jury upon which the appointment of the conservator was based

found that McKinney was insane. In view of the finding of

this man as shown in this record, from the time of his

boyhood, the record of the conservator as to his insanity

of a conservator for so long in 1911 was admitted, and as

conclusive on the question of insanity, but to be considered

by the jury for what it was worth. It was noted in this record

had shown that the conservator was appointed for the said

reason that McKinney was a person of unsound mind and

question as to the admissibility of the record, which record

would be presented."

On the question of the remoteness of the evidence and

judgment thereon it must be borne in mind that the conservator

were brought in the Probate Court for the appointment of the

conservator April 5, 1911, three months after the will was

executed and that the delay in having the same admitted as

finally, was caused by the defendant in contesting the

petitioners' right to have the judgment of the Probate Court

reviewed by the Circuit Court, and it was not until November

24, 1911, that the Supreme Court reversed the Circuit Court

and Probate Judge and ordered a writ of mandamus to compel a

review of the judgment of the Probate Court. This review was

not finally disposed of until January 10, 1912 when the opinion

was filed by another division of this court, as above stated,

affirming the judgment of the Circuit Court.



11.

The rule as to what is testamentary capacity to render a will valid has long been firmly established. In Hoskinson v. Lovelette, 365 Ill. 21, the court said: "In order to make a valid will the testatrix must have been capable of knowing the extent of her property and the natural objects of her bounty and of understanding the nature and effect of the act of executing her will. (Donovan v. St. Joseph's Home, 295 Ill. 125, 134; Dowie v. Sutton, 227 Ill. 183, 196.) \*\*\*. Age, sickness or debility of body does not affect the capacity to make a will if the testator has sufficient intelligence remaining to make a will." And in Peters v. Peters, 276 Ill. 237, the court said, (p. 243): "Proof of the mental condition of the testator a reasonable time before or after the making of a will may be received where it tends to show mental condition at the time of the execution of the instrument."

Complaint is also made that "A new trial should be granted because of the inflammatory argument of the counsel for the plaintiffs which in a large part related to charges of undue influence." There are no instructions in the abstract or record and therefore we must assume that the jury were properly instructed. The only question for them to consider was whether the testator, at the time of the making of the will, was capable of knowing the extent of his property and the natural objects of his bounty and that he understood the effect of his act in executing the will. The evidence and argument as to undue influence could only be considered in determining this question. Moreover, we have examined the record and are unable to find any objection made to the argument.

Upon a consideration of the record we think the evidence as to Frank Dombrowski's physical and mental condition,





12.

namely that he had suffered a cerebral thrombosis some 18 or 20 years before he executed the will, and as to how his property was managed, that his physical and mental condition was growing worse, especially after the death of his wife, and considering also the fact that on the day the will was executed, while he provided for certain bequests, yet he did away with the title to his real estate at that time, and a few months thereafter, disposed of his personal property in the nature of the promissory notes and trust deed hereinbefore mentioned, all of which evidence should be considered by the jury in determining whether he understood the disposition he was making of his property at the time he executed the will. By the disposition of the property, there would be little or nothing for the will to operate upon. The will was somewhat complicated and the jury might well find upon a consideration of all the evidence, that he did not understand the nature of the will because at the very time he executed it, he was disposing of his real estate, and a few months afterwards, practically all of his personal property. And further, in view of all the evidence in the record we think it was not reversibly erroneous for the court to admit in evidence the two verdicts and the judgment thereon, of which complaint has been made.

In Tidholm v. Tidholm, 391 Ill. 19, which was a case to contest a will, the court said, (p. 23): "It is well settled that a will contest is strictly a statutory and not an ordinary chancery proceeding. The cause is tried upon the issue whether the writing produced is the will of the testator. The verdict of a jury in a will contest has the same force and effect as the verdict of a jury in an action at law." And counsel for defendants in the instant case say that the

namely that he had suffered a mental impairment, was 18 or 20 years before he executed the will, and at the time his property was managed, that his physical and mental condition was such, especially after the death of his wife, and considering also the fact that on the day the will was executed, while he provided for certain persons, he did away with the title to his real estate at that time, and a few months thereafter, disposed of his personal property in the nature of his ordinary wages and such other things as he mentioned, all of which evidence would be considered by the jury in determining whether he understood the disposition he was making of his property at the time he executed the will. By the disposition of the property, there would be little or nothing for the will to dispose of. The will was somewhat complicated and the jury might well find upon a consideration of all the evidence, that he was not understand the nature of the will he executed at the very time he executed it, he was disposing of his real estate, and a few months thereafter, disposed of his personal property. And further, in view of all the evidence in the record we think it was not reasonably probable that he was competent in evidence the two verdicts and the judgment of the court, of which complaint has been made.

### In *Tabor v. Tabor*, 107 Ill. 51, 40 N.E. 2d 1000.

To contest a will, the contestant must show that the testator was of sound mind at the time he executed the will, and that he was not under any undue influence, fraud, or coercion. The burden of proof is on the contestant. The verdict of a jury in a will contest case is not binding on the court, and the court may set aside the verdict of a jury in an action for the recovery of property, and may enter its own verdict. The court may also set aside the verdict of a jury in an action for the recovery of property, and may enter its own verdict. The court may also set aside the verdict of a jury in an action for the recovery of property, and may enter its own verdict.

13.

verdict is against the manifest weight of the evidence and therefore cannot stand.

In Read v. Cummings, 324 Ill. App. 607, we said: "We are not authorized to disturb the verdict and judgment unless we are of opinion that it is against the manifest weight of the evidence."

In the case of Eimers' Motor Service, Inc. v. Cummings, et al., 323 Ill. App. 653 (Abst.) we said that: "Their verdict was in favor of plaintiff. They saw and heard the witnesses testify, their verdict was sustained by the trial judge who also saw and heard the witnesses testify. They were in a better position to determine the truth of the matter in controversy than are we, sitting in a court of review where we have but the printed page before us."

Upon a careful consideration of all the evidence in the record before us, we are unable to say that the verdict is against the manifest weight of the evidence. The decree of the Superior court of Cook county is affirmed.

DECREE AFFIRMED.

Niemeyer, P. J., and Feinberg, J., concur.





44145

TONY MAIORANO,  
Appellant,

v.

MARIA CACIOTTOLO,  
Appellee.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

33314.772

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

November 2, 1946, plaintiff, who claimed to be the holder and owner of a promissory note, brought an action against the defendant, one of the joint makers of the note. There was a trial before the court without a jury, a finding and judgment against plaintiff and he appeals.

The record discloses that on November 29, 1930, Carmine Caciottolo and his wife, the defendant, Maria Caciottolo, by their marks, signed a promissory judgment note for \$1,000 due one year after date, payable to Gelsomino Maiorano, with interest thereon at 5% per annum after date. On the bottom of the note J. N. Tortorell, signed his name as a witness to their marks. The payee endorsed his name on the back of the note. A further endorsement of the payment of \$50 was made April 15, 1937. Tortorell, called by the plaintiff, testified that he was in the real estate and insurance business and had been so engaged for over 30 years. That he knew the makers of the note and had handled considerable of their business and particularly in connection with the piece of real estate where the defendant was now living. That he drew up the note and it was signed by the defendant and her husband, who died in 1941, and that he wrote his name as a witness to their marks at the time. On cross-examination he testified that when defendant and her husband purchased the property in 1925, it was subject to purchase

JOHN WATSON,  
 President,  
 BELL SYSTEM,  
 Chicago.

8322 115

RE: JOTTED "GODDARD" ...

November 2, 1934, ... who claimed to be ...

... of a ... against the ...

There are a ... and judgment ...

The record ...

Casale ...

Casale ...

note for \$1,000 ...

Maiano, with ...

On the bottom of the note ...

as a witness to ...

the back of the note. A ...

of \$50 was made April 25, 1937, ...

plaintiff, testifying that he ...

insurance business and had been ...

That he knew the ...

able of their ...

the piece of ...

That he drew up the note and it was signed by ...

and her husband, who died in 1931, and that he ...

name as a witness to ...

examination he ...

purchased the ...

2.

money mortgages. Afterwards about 1934, there was a mortgage made securing the loan from the Home Owners Loan Corporation. That when the note was made he handed it to defendant's wife, that he did not see any delivery of the note or any money passed.

Plaintiff testified that he had known the defendant for more than 35 years; that she was about his third cousin; that the husband died in 1941; that in 1925, the deceased and the defendant came to his home and the deceased asked him for \$2,000; that he replied, "Uncle, I never got it -- \$2,000.00." And my brother, the payee, Gelsomino Maiorano, was there and I said: "Ask my brother," so he spoke to my brother and said he wanted to buy a house and the brother said he would give him the money if he was given a first mortgage on the property. That he could not give him a first mortgage because he did not have money to pay part cash for the property. So about a week or two afterwards the brother, the payee, gave the deceased \$2,000 so he bought the house and about two years afterwards the deceased and his wife came over to the house of the witness and paid \$1,000. That afterwards the deceased and his wife made their notes, some for \$25 and some for \$50 each; that they were unable to pay these and afterwards the deceased said: "Well, nephew, I can't pay so we are going to make a note for \$1,000." That Mr. Tortorell made the note. Afterwards the brother, the payee, showed plaintiff the note; they were living together. That in 1936 the plaintiff called at defendant's house with his brother, the payee, and the brother asked that the \$1,000 be paid because he was going back to the old country and that he also asked defendant for the money and she said: "I haven't got any money." And he said, to plaintiff "Nephew, if you got any money, go ahead and pay him, and I will pay you." And plaintiff then paid his brother the \$1,000.00 and the brother, the payee, endorsed

money mortgage. Atkinson bought this, there was a mortgage made securing the loan from the same source. That when the note was made he wanted it to be secured by the fact that he did not see any delivery of the note or any money.

passed.

Plaintiff testified that he had known the defendant

for more than 10 years; that he had known him since 1880.

That the defendant had in 1881, when in 1881, the defendant and the defendant came to his house and the defendant asked him

for \$2,000; that he replied, "No, I never saw it."

\$2,000.00. And my brother, the witness, delivered a check.

was there and I said: "Ask my brother," as he was in the

brother and said he wanted to buy a house and the witness

said he would give him the money if he would give him a

mortgage on the property. That he would give him a

mortgage because he did not have any other way to

the property. He asked a man in the street for a

payee, gave the deceased \$2,000 and he found the money

about two years afterwards the deceased and his wife

over to the house of the witness and said, "I want

wrote the deceased and his wife made their house, and the

\$25 and some for the deed; that they were unable to

and afterwards the deceased said: "Well, my brother, I will

so we are going to make a note for \$2,000.00. (The witness)

made the note. Afterwards the plaintiff, the witness, passed

plaintiff the note, saying that it was his house. That in 1882

the plaintiff called on defendant's house and his witness,

the payee, and the brother asked that the \$2,000 be paid

because he was going to use the money and that he did

asked defendant for the money and the witness said: "I never saw it"

money." And he said, "Plaintiff," "I will see you."

to send and pay him, and I will see you."

said his brother the \$2,000.00 and the witness, the payee, delivered



3.

the note and gave it to plaintiff. That on April 15, 1937, the witness went to the home of the deceased maker, and the defendant, and asked for a little money. That the defendant said: "I will go in the room and see what I got and give it to you," so she went into the room and brought out \$50 and gave it to plaintiff and that he wrote the endorsement of the payment on the back of the note at that time. That afterwards he visited defendant and her husband several times; that after the husband died "I never asked her for money, because he was two or three years awful bad sick and I was sorry and never asked her for any money." That afterwards he asked her a number of times to pay the note and defendant said she had no money and for him to wait until her son started to work. The last time he asked her was in 1938; that after the husband died in 1941, he did not bother defendant any more because he knew she had no money, until 1946 when he went to her home and said: "Well, Aunt, will you give me a little money?" and she said, "I don't owe you any money. A lot of people lose money and you are going to lose yours too."

Other witnesses were called on behalf of plaintiff and gave testimony tending to support plaintiff's claim, but we think it would serve no purpose to discuss it.

Defendant testified in her own behalf, through an interpreter, that Mary Caputo, her married daughter, owned the place where defendant lives; that she could not continue to pay for the property and turned it over to her daughter and a warranty deed in joint tenancy was introduced in evidence, dated June 8, 1927, and recorded June 9, 1927, in the Recorder's Office of Cook county. The deed is from Mary Caputo and conveys the property to defendant and her husband in joint tenancy, the makers of the note. She further testified that she knew the payee and his brother,



the note and gave it to plaintiff. That on April 15, 1937, the witness went to the home of the deceased wife, and the defendant, and asked for a 10 dollar note. The defendant said: "I will go in the room and get the note and give it to you," so she went into the room and brought out 50 and gave it to plaintiff and that on about the endorsement of the payment on the back of the note at that time. That afterwards he visited plaintiff and her husband several times; that after the husband died "I never asked her for money, because he was two or three years earlier and sick and I was sorry and never asked her for any money." That afterwards he asked her a number of times to pay the note and defendant said she had no money and for him to wait until her son started to work. The last time he asked her was in 1938; that after the husband died in 1941, he did not both a defendant any more because he knew she had no money, until 1946 when he went to her home and said: "Well, Aunt, will you give me a little money?" and she said, "I don't owe you any money. A lot of people lose money and go to jail going to lose your head."

Other witnesses were called on behalf of plaintiff and gave testimony tending to exonerate plaintiff's claim, but we think it would serve no purpose to discuss it. Defendant testified in her own behalf, through an interpreter, that Mary Gabuto, now married defendant, used the place where defendant lived; that she could not remember to pay for the property and turned it over to her husband and a warranty deed in joint tenancy was introduced in evidence, dated June 8, 1947, and recorded June 9, 1947, in the Recorder's Office of Cook County. The deed is from Mary Gabuto and conveys the property to defendant and her husband in joint tenancy, the return of the note. She further testified that she knew the parties and his brother,

4.

the plaintiff and the real estate man (Tortorell) "who testified this morning;" that she had dealt with him and he drew up papers for them; that this was the first time she recognized the note in suit; that her husband always did the business and never confided in her. That she never signed the note; that she "didn't make any cross," on the note. That she never gave her husband \$50 which he turned over to plaintiff at her house. That the last time plaintiff "was at my house he asked me for <sup>the</sup> money, and I said 'What can I give you, I have not got anything,' that Mr. Maiorano (plaintiff) said, 'I would like to have the money' the last time he was over, recently. He said he wanted the money to send to his brother because he needed it in the old country. I said to him, 'Why aske me? I don't know anything about that money -.'" She further testified: "I am not working anyhow, and I wouldn't even be able to pay it to you."

Before the evidence was closed, the court made some remarks from which one of the counsel for plaintiff inferred that the Court was going to decide against plaintiff, whereupon counsel said: "Judge, if you are going over that I will take a non suit." In this court counsel contend that the court erred in not granting plaintiff's motion for a non suit. There is no merit in this contention. Chicago Title & Trust Co. v. The County of Cook, 279 Ill. App. 462. Gunderson v. First National Bank of Chicago, 296 Ill. App. 111; Warren v. Yost, 317 Ill. App. 79; Fidelity & Cas. Co. v. Heitman Trust Co., 317 Ill. App. 256.

Upon a consideration of all the evidence in the record we are clearly of opinion that there was no substantial evidence to sustain the defense in this case and the judgment



5.

of the Municipal court of Chicago is reversed and judgment entered in this court in favor of plaintiff and against defendant for the amount due on the note, \$950, with interest thereon at 5%, amounting to \$746.25, or a total judgment of \$1,696.25.

JUDGMENT REVERSED AND JUDGMENT IN  
THIS COURT.

Niemeyer, P. J., and Feinberg, J., concur.





A

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APPEAL FROM  
CIRCUIT COURT OF  
COOK COUNTY.

338 LA. 163

23

The record discloses that the parties lived in Chicago and were married December 11, 1945 at Kansas City, Kansas and lived together until August 1, 1946, at which time he deserted plaintiff and went to live with his mother. October 14, 1945, a son was born and another child was expected in December, 1946. November 1, Ernest N. Rubel filed his petition in which he alleged that defendant was adjudged insane February 19, 1942, by the County court of Cook county and that such adjudication had never been vacated. That he had been appointed conservator of defendant's estate but not of his person, by the Probate court of Cook county, and prayed that he be allowed to enter his appearance. An order was entered accordingly and on the same day Arthur Goldblatt was appointed guardian ad litem

The record discloses that the parties lived in Chicago and were married December 11, 1945 at Kansas City, Kansas and lived together until August 1, 1946, at which time he deserted plaintiff and went to live with his mother. October 14, 1945, a son was born and another child was expected in December, 1946. November 1, Ernest N. Rubel filed his petition in which he alleged that defendant was adjudged insane February 19, 1942, by the County court of Cook county and that such adjudication had never been vacated. That he had been appointed conservator of defendant's estate but not of his person, by the Probate court of Cook county, and prayed that he be allowed to enter his appearance. An order was entered accordingly and on the same day Arthur Goldblatt was appointed guardian ad litem



3.

particularly but not in limitation thereof the allegation that defendant was not the father of the first child) and that they be considered specifically denied by defendant except that he was a resident of Cook county, Illinois, which the order shows defendant specifically admitted. After this order was entered and the cross complaint filed, on April 3, 1947, a decree awarding plaintiff separate maintenance and dismissing the cross complaint was entered.

The decree recites the cause came on to be heard upon the amended complaint for separate maintenance, the answers and counter claim, etc., and the court having heard all the evidence and argument of counsel, found that both parties were actual residents of Cook county for more than one year next before the filing of the complaint; that they were legally married December 11, 1945, in Kansas City, Kansas, that one child, Melode Ann, was born as a result of the marriage, December 20, 1946, that prior thereto, another child, Stephen, was born out of wedlock on October 14, 1945; that the parties intermarried after the birth of Stephen and "that the defendant acknowledged the paternity of said child;" that they were in the care and custody of their mother. The court further found that the defendant's income was about \$3,000 a year; that he owned some stocks of the approximate value of \$25,000 and some interest in vacant real estate. It was decreed that defendant pay to the plaintiff \$40 per week for the support of the plaintiff and the two children. It was also decreed that defendant pay counsel for plaintiff \$1,500; counsel for the conservator and guardian ad litem received a total of \$1,500 and the conservator \$150.

January 27, 1947, plaintiff took the deposition of defendant pursuant to the provisions of the Civil Practice Act. This deposition was read on the hearing.

particularly but not in limitation thereof the following

that defendant was not the father of the child

and that they be considered specifically dealing with

but except that he was a resident of Cook County, Illinois,

which the order above defendant specifically admitted. After

this order was entered and the order continuing trial, on

April 5, 1947, a decree awarding custody was entered

and was dissolved the case continued was continued.

The decree recited the usual case on the basis

upon the amended complaint for separate maintenance, the

answers and counter claim, etc., and the court entered final

all the evidence and arguments of counsel, found that both

parties were actual residents of Cook County, Illinois, and

one year next before the filing of the complaint; that both

were legally married December 11, 1941, in Cook County,

Kansas, that one child, whose name was not stated

of the marriage, December 11, 1941, was born to them,

another child, Stephen, was born out of wedlock in Cook

County, Illinois, that the parties had no other children

of Stephen and "that the defendant acknowledged the paternity

of said child;" that they were in the state and country at

their mother. The court further found that the defendant

income was about \$5,000 a year; that he owned some stocks

of the approximate value of \$25,000 and some interests in

vacant real estate. It was further found that defendant was no

the plaintiff \$40 per week for the support of the plaintiff

and the two children. It was also decreed that defendant pay

counsel for plaintiff \$1,000; counsel for the defendant

and custodian of the child received a total of \$1,000 and was

counsel for \$100.

January 27, 1947, plaintiff and the defendant

of defendant pursuant to the provisions of the Illinois

Practice Act. This deposition was taken in the presence



4.

He was cross examined by counsel for plaintiff and testified that shortly before the first child, Stephen, was born he made arrangements for her confinement and paid her hospitalization and doctor's bills; that "I never denied the baby is mine." That on December 3, 1945, he was at Riverside, California and sent a telegram to plaintiff who was then living in Evanston, in which he said that he loved her and inquired how she felt about it, and asked her to wire him at Phoenix, Arizona. That at that time he thought he loved her, as stated in the telegram, and that he remembered then calling her from Phoenix, to come to Kansas City to meet him so they could be married. He told her to take an airplane. That she met him in Kansas City and they made arrangements to get married. That the next day they went to Kansas City, Kansas, which was across the Missouri River; that they got a marriage license there and went to a judge of the Probate court who married them. They then went back to the hotel at Kansas City, Missouri, and registered as William Lawrence and Mrs. Lawrence. That they were married on December 11, and on the 13, they both took a plane back to Chicago; that shortly thereafter he went to live with his mother in Wilmette and the wife went back to live with her sister in Evanston. That afterwards he often met plaintiff and her friends socially.

Defendant's mother filed a petition in the County court of Cook county to have her son, the defendant, declared to be insane and two doctors who were appointed as commissioners, examined defendant and reported that on the 19th of February, 1942, they made a personal examination, found him to be insane and a fit person to be sent to the State Hospital for the insane; that his disease was chronic alcoholism and dementia, and upon consideration of the report



He was cross examined by counsel for plaintiff and testified that shortly before the River child, Stephen, was born he made arrangements for her confinement and birth and hospitalization and doctor's bills; that "I never carried the baby in arms." That on December 3, 1942, he was at Riverside, California and sent a telegram to plaintiff who was then living in Evanston, in which he said that he loved her and hoped how she felt about it, and asked her to write him at Evanston, Arizona. That at that time he thought he loved her, he stated in the testimony, and that he remembered those feelings her from Phoenix, to come to Kansas City to meet him so that could be married. He told her to take an airplane. That he met him in Kansas City and they made arrangements to get married. That the next day they went to Kansas City, Kansas, which was across the Missouri River; that they got a marriage license there and went to a house of the town court who married them. They then went back to the night at Kansas City, Missouri, and registered as William Lawrence and Mrs. Lawrence. That they were married on December 11, and on the 12, they both took a plane back to Chicago; that shortly thereafter he went to live with his mother in Wilmette and the wife went back to live with her sister in Evanston. That afterwards he often met plaintiff and her friends socially.

Defendant's mother filed a petition in the County Court of Cook County to have her son, the defendant, declared to be insane and two doctors who were appointed as commissioners, examined defendant and reported that on the 12th of February, 1942, they made a personal examination, found him to be insane and a fit person to be sent to the State Hospital for the Insane; that his disease was chronic alcoholism and dementia, and upon consideration of the report

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by the court, judgment was entered and he was committed to the State Hospital at Dunning. April 4, 1942, the superintendent of the institution notified the judge of the County court of Cook county that defendant was paroled on that date from the institution. That on July 4, 1942, the superintendent sent another notice to the judge of the County court reporting that Lawrence was "discharged 7-4-42 - by Statute improved," and it is agreed that defendant was never returned to the institution and that there was no order of the County court of Cook county showing that he had been restored to reason.

When the parties were applying for a marriage license in Kansas City, Kansas, they made an affidavit which is on a blank form, that he was 28 years of age and she 22. Then follows in printing: "that they have their parents' consent to said union, and that neither has been divorced within six months last past.. \*\*\*

"That neither of said parties is or ever has been epileptic, imbecile, feeble minded or insane; or, if either is or ever has been so afflicted, then that the woman is more than forty-five years of age.

"And that neither party was born subsequent to the insanity of either his or her parents, or if so, that the woman about to be married is more than forty-five years of age."

Counsel for the guardian ad litem and the conservator contend that "No insane person or idiot shall be capable of contracting a marriage.

"The defendant submits that the marriage of the parties hereto is void for the reason that the defendant had been adjudicated insane in the County Court of Cook County, Illinois, prior to the time of the marriage ceremony performed in Kansas City, Kansas; that he had not been restored to sanity by proper

by the court, judgment was entered and he was committed to the State Hospital at Joliet, April 4, 1901, the superintendent of the institution notified the clerk of the County Court of Cook County that defendant was committed on that date from the institution. That on July 1, 1901, the superintendent sent another notice to the clerk of the County Court that defendant was committed to the institution by statute improved, and it is further stated that defendant never returned to the institution and that he has not been of the County Court of Cook County since that time and has not been restored to reason.

Then the parties were examined for insanity in Kansas City, Kansas, they made an affidavit which is in a blank form, that he was 30 years of age and the 1st. Then follows in printing: "that they have their parents' consent to said union, and that neither has been insane within six months last past."

"That neither of said parties is or ever has been epileptic, imbecile, feeble minded, insane; or, in either is or ever has been so afflicted, from that time as is more than forty-five years of age."

"And that neither party was ever adjudged to be insane of either his or her parents, or if so, that the woman about to be married is more than forty-five years of age."

Counsel for the defendant and the complainant contend that "no insane person or idiot shall be capable of contracting a marriage."

"The defendant submits that the marriage of the parties hereto is void for the reason that the defendant had been adjudicated insane in the County Court of Cook County, Illinois, prior to the time of the marriage ceremony performed in Kansas City, Kansas; that he had not been restored to sanity by proper

6.

proceedings prior to such ceremony or at any other time, so that he was insane at the time of such marriage. The marriage of an insane person is void by the declared public policy of the State of Illinois."

In Lindberg v. Mutual National Bank of Chicago, 318 Ill. App. 195, we had occasion to consider a similar question where we discussed the authorities rather extensively, and held that where the evidence showed a person had been adjudged insane by the County court of Cook county, and committed to the State Hospital at Kankakee, where he remained for about 10 months and then was released on parole and discharged from the institution about 3 months thereafter, and the County court had been notified by the superintendent of the institution of the parole and the discharge, and the evidence showed he had recovered his sanity, that a formal order of the County court showing that he had recovered, was not essential to his ability to enter into valid business contracts; that in these circumstances when the person was sane was a question of fact. We there discussed our statutes and a number of cases decided by our Supreme court and from the state of Kansas, and there said (p. 205): "In Mut. Life Ins. Co. v. Wiswell, 56 Kan. 765, it was held that an adjudication of insanity followed by commitment of the patient to an asylum for the insane does not create a conclusive presumption of the continuance of the insanity several years after the discharge of the patient from the asylum."

In Ertel v. Ertel, 313 Ill. App. 326, a suit in chancery was brought in the Circuit court of Adams county by the conservator of Elmer Ertel to annul a marriage which had been entered into in Missouri in 1940, between Elmer and the defendant. It was alleged that Elmer was feeble minded. The suit was dismissed for want of equity. The court there held that where there was testimony that the allegedly feeble-minded



proceedings prior to such ceremony or at any other time, so that he was insured at the time of such ceremony. The marriage of an insured person is void by the public policy of the State of Illinois.

In Lindberg v. General National Bank of Chicago, 115

Ill. App. 185, we had occasion to consider a similar question where we discussed the authorities rather extensively, and held that where the evidence showed a person had been adjudged insane by the County Court of Cook County, and committed to the State Hospital, and remained for about 10 months and then was released and discharged from the institution about 2 months later, after, and the County Court had been notified by the superintendent of the institution of the release and the discharge, and the evidence showed he had recovered his sanity, that a formal order of the County Court, showing that he was recovered, was not essential to his ability to contract, valid business contracts; that in these circumstances, when the person was sane was a question of fact. In these circumstances, out of statutes and a number of cases decided by our Supreme Court and from the State of Kansas, and have said (p. 202): "In Wet. v. Wet. 115, Ill. App. 185, it was held that an adjudication of insanity followed by commitment of the patient to an asylum for the insane, did not create a conclusive presumption of the continuance of the insanity several years after the discharge of the patient from the asylum."

In Friel v. Friel, 115 Ill. App. 185, a wife is incompetent

was brought in the Circuit Court of Cook County by the conservator of Friel's estate to annul a contract which had been entered into in 1905, between Friel and the defendant. It was alleged that Friel was insane at the time the contract was made. The court there held that there was testimony that the allegedly insane person



ward engaged in numerous important business transactions and performed labor satisfactory to his employer, less mental capacity was required to enable a person to enter into a marriage contract than was required for the execution of ordinary business contracts. The court there said (p. 334): "In Illinois, less mental capacity is required to enable a person to enter into the marriage contract than is required for the execution of ordinary business transactions.

Flynn v. Troesch, 373 Ill. 275; Hagenson v. Hagenson, 258 Ill. 197."

The Kansas law on the question of marriage is in all essentials the same as in Illinois. Toepffer v. Toepffer, 151 Kan. 924. That action was for divorce, and custody and support for the minor child, and for permanent alimony. It was contended that the defendant was insane at the time of the marriage. The court there said, (p. 928): "While we have held that when insanity or mental unsoundness is shown to exist it is presumed to continue, we have just as definitely held the presumption is a disputable one, and may be rebutted by evidence of the actual condition of mind at any particular subsequent time. \*\*\* [citing cases] The rule that the presumption of continuing insanity, created by a verdict of insanity, may be rebutted by any competent evidence of a subsequent sound condition of mind at a particular time, appears to be well established."

In Stoltze v. Stoltze, 393 Ill. 433, the court said (p. 443): "The legal presumption is that all persons of mature age are sane, but after they have been adjudged insane the presumption is reversed until it is rebutted by evidence that they have become sane. When the transaction complained of occurred before the inquest is had, the proof of insanity devolves upon the party alleging it. It is otherwise if it took place afterwards. The legal presumption of sanity continues until inquest is had. Then the presumption

117. 137."

[illegible]

in Geoffrey v. Haines, 200 Ill. 453, the court said  
- 441 - : "The legal presumption is that all persons of  
mature age are sane, but this presumption does not  
include the presumption of insanity until it is rebutted  
by evidence that they were insane when the act was  
committed or occurred before the instant in time, the proof  
of insanity devolves upon the party asserting it. It is neces-  
sary it is to take place after the fact. The legal presumption of

8.

may be reversed until it is rebutted by evidence showing that sanity has returned. McGregor v. Keun, 330 Ill.

106."

In the instant case the evidence as to the sanity of defendant at the time the marriage was entered into was conflicting. The chancellor saw and heard the witnesses testify. He found that subsequent to defendant's release from the hospital on April 4, 1942, defendant participated in diverse employments and social activities and that his conduct disclosed that he had sufficient understanding to know the nature of the contract of marriage. And that at the time of marriage defendant was sane.

We have considered all the evidence in the record and are clearly of opinion that the finding of the chancellor is sustained by the manifest weight of the evidence. It is certain we would not be warranted under the law in disturbing such finding on the ground that it was against the manifest weight of the evidence. The evidence is to the effect that defendant, shortly after the marriage, left his wife and went to live with his mother so that he could help take care of her, although there was no serious altercation or trouble between him and his wife. That subsequent to that time he often visited with his wife and her friends, playing cards and engaging in other social activities. Moreover, he gave a discovery deposition, hereinabove mentioned, in which he detailed what he did from the time he was confined in the State Hospital until the present. We think it would serve no useful purpose to discuss the evidence of the several witnesses in detail for we are of opinion that the decree must be affirmed.

The decree of the Circuit court of Cook county is affirmed.

DEGREE AFFIRMED.

Niemeyer, P. J., and Feinberg, J., concur.

may be reversed until it is reversed by evidence showing that family has returned. Johnson v. Kern, 250 Ill.

108."

In the instant case the evidence is to the effect

of defendant at the time the marriage was solemnized was conflicting. The defendant's own testimony is to the effect that he found that defendant on defendant's return from the hospital on April 4, 1943, defendant was in diverse employment and social activities and that he conduct disclosed that he had sufficient understanding to know the nature of the contract of marriage, and that at the time of marriage defendant was sane.

We have considered all the evidence in the case

and are clearly of opinion that the finding of the court is sustained by the evidence and that the evidence is certain we would not be warranted in saying that the finding is an error. The evidence is to the effect that defendant, shortly after the marriage, 1943, his wife and went to live with his mother and that he could help take care of her, although there was no serious altercation or trouble between him and his wife. The evidence to that time he often visited with his wife and her friends, also, and was in good health. Moreover, he has a discovery of his activities, in which he is active and in the time he was confined in the State hospital until the present. We think it would be a useful purpose to give the evidence of the several witnesses in detail for we are of opinion that the finding that he was sane at the time of the decree of the Circuit Court of Cook County is

affirmed.

THE COURT AFFIRMED.

Niemeyer, P. J., and Feinberg, J., concur.

*3* *Del. App.*  
*OK. 3*  
*7-19-68*

*O.K.*  
*HOB*

Abstract

*See 3 A*

Agenda No. 4.

3391.1. 220

SECOND DISTRICT.

MAY TERM, A. D. 1947.

Appeal from the  
Circuit Court of  
Kane County.

Carl F. Lindholm, the plaintiff in this suit, was driving his automobile in an easterly direction on Lincoln Avenue in the City of Elgin, and the defendant, William A. Dohm, was driving his automobile in a northerly direction on Bellevue Street. The cars collided at the intersection, and Lindholm brought suit in a Justice of Peace Court in Kane County for damages to his automobile. The case was appealed to the Circuit Court of Kane County, and was tried before the Court without a jury. The Court found the issues in favor of the plaintiff, and assessed his damages at \$333.77 and entered judgment in favor of the plaintiff for this amount. The defendant has prosecuted an appeal to this Court.

The evidence shows that Lindholm was driving in an easterly direction at the rate of about twenty-five miles per hour. According to his testimony, as he approached the intersection, he slowed down





2.

and looked to the right, but saw no car approaching. He then proceeded to cross the intersection. He claims that he was nearly through the intersection when the defendant's automobile struck his car in the rear, whirled it around, and in four or five seconds, the front end of his car was again struck by the defendant's car; that he lost control of his car, and it proceeded in a northerly direction over across the curb line of Lincoln Avenue.

In the defendant's car was a passenger, a young lady by the name of Mary Lou Tracy. She testified that she was riding with the defendant in a northerly direction approaching Lincoln Avenue; that she was familiar with driving, and the speed of cars, and that the defendant was not exceeding twenty-five miles an hour, as they approached the intersection; that she looked to the left and saw the plaintiff's car about twenty-five feet west of the north and south curb line; that it did not slacken in speed, but proceeded through the intersection; that she immediately warned her companion of the approach of the other car, and he put on his brakes, and the cars collided. The left front of the plaintiff's car striking the right front of the defendant's car; that as the collision took place, she was thrown forward, and whether or not there was a second collision, she was unable to state.

The defendant testified that he was driving his car in a northerly direction, approaching Lincoln Avenue at the rate of speed of about twenty-five miles per hour; that he looked both to his right and left, and did not see the plaintiff's car approaching; that he collided with the plaintiff's car close to the intersection of the two streets, his left front fender coming in contact with the plaintiff's right fender; ~~that the plaintiff's car whirled around, and the~~  
*and must have rebounded, and then the left side of my car hit the right rear of the other car.*



3.

~~right fender of each car collided,~~ that he lost control of his car and went across the road into the curbing of Lincoln Avenue. It is conceded that, as the plaintiff drove east on Lincoln Avenue, his view was obstructed by a row of trees near the curb line on Bellevue Street, and he could not have a clear view of the traffic from the south, until he was past these trees. He says he slowed his car, shifted into second gear, then proceeded to cross the street, but did not see the defendant's car until after it struck him. The undisputed evidence is, that the defendant's car was approaching the intersection at practically the same speed as the plaintiff's car. Under the rules of the road, the defendant would ordinarily have the right of way. A Court of review is always reluctant to set aside a finding of fact of the trial court, or a verdict of jury, unless it is clearly against the manifest weight of the evidence. Under the facts, as disclosed by this record, it is our conclusion that the plaintiff's negligence in not observing the approach of the defendant's car, contributed largely to the proximate cause of his own injuries, and under such circumstances he is not entitled to recover in this suit. The judgment therefore, is reversed.

Judgment reversed.





In The  
APPELLATE COURT OF ILLINOIS  
Second District  
October Term, A. D. 1946

333.4.220

WALTER W. PIKE, Executor of the Last  
Will and Testament of Frederick W.  
Kemp, Deceased.

Plaintiff-Appellant.

vs.

HARRY F. LEWIS, also known and described as Harry L. Lewis and commonly called Frank Lewis,  
MINNIE I. LEWIS.

Defendants-Appellees.)

Appeal from  
Circuit Court,  
La Salle County.

Bristow, J.

Walter W. Pike, as executor of the last will and testament of Frederick W. Kemp, deceased, brought suit in the Circuit Court of La Salle County against Harry F. Lewis and Minnie I. Lewis to set aside as fraudulent a certain release of a \$5500.00 mortgage or trust deed and for a foreclosure of the same. After a hearing before the Master in Chancery, the Circuit Court denied the relief sought by the plaintiff, and this appeal followed.

Briefly, the complaint alleges that Frederick W. Kemp, at the time of the alleged occurrences and for more than four years prior thereto, was in a weakened condition



and unable to transact ordinary business affairs; that Harry F. Lewis managed, controlled and possessed the estate of Frederick W. Kemp, and counseled and advised him and carried on all transactions pertaining to his business; that before Kemp's death, the said Harry F. Lewis returned all the papers and effects of the said Frederick W. Kemp to him with the exception of the \$5500.00 note in question; that on December 19, 1936, the said Harry F. Lewis wrongfully and fraudulently caused George O. Grover to release the trust deed on the margin of the record.

The defendants' in their answer admit the execution of the said trust deed, and that they have in their possession the same, but deny that they had it for safe keeping, and state that on May 13, 1935, the said Frederick W. Kemp endorsed on the back of the note in question the following: "May 13, 1935, I, at this time, transfer to Harry F. Lewis and Minnie I. Lewis their note of April 22, 1929, together with trust deed of April 22, 1929, not to be recorded and released to above named until after my death. Amount of note \$5500 together with interest." And that he signed said instrument with the name "Fred W. Kemp.", and that he delivered said instrument to defendant Harry F. Lewis. And the defendants further answering stated that, in the month of December, 1936, the said Frederick W. Kemp requested them to bring the \$5500.00 note to his home where he was confined by illness, and that when the note was given to him he wrote thereon the following: "December 19, 1936 Mr. George Grover, please release this note to Harry F. Lewis and Minnie I. Lewis." and that he signed his name below said writing as "Frederick W. Kemp." and gave said note to defendant Harry F. Lewis. And that on December 19, 1936, the said George O. Grover as such trustee did release the lien of said



trust deed in accordance with directions executed by Frederick W. Kemp. The defendants further answering stated that Frederick W. Kemp was at all times during the above transaction of sound mind, and that no improper or fraudulent influences were exercised upon him. Replying to this answer, the plaintiff alleges that the above instruments set forth in defendants' answer were not executed by Frederick W. Kemp, and that he at the time was in a weakened condition and unable to understand the nature and effects of his acts.

Frederick W. Kemp was a man about 80 years of age at the time of his death which occurred on February 22, 1937. Although he was suffering with tuberculosis, he was not confined to his bed but a short time before his death. The plaintiffs asserted in their pleadings that he lacked mental capacity to transact ordinary business, but there was no testimony offered to indicate such was true. In fact everything points to the contrary. That Kemp signed the instruments evidencing his gift of the note in question to the Lewises is denied by the plaintiffs, but there was no evidence offered to support this issue.

Mr. Kemp on December 16, 1936, executed his will which was admitted to probate in the Probate Court of La Salle County. It directed the payment of his debts, and gave to his widow that which she would take under the laws of this state, and divided the balance between his wife and a relative, Mary Jane Pike. No question was ever raised about Mr. Kemp's mental capacity to make such a will. It was a normal rational disposition of his property.





The evidence shows that Mr. Kemp was a queer person with about average intelligence, very industrious, and frugal. For many years he worked at the La Salle County Poor Farm where he was a laborer and assistant superintendent in charge of the barn, the cows and the garden. He always ate alone, frequently taking his food to the barn and eating it there rather than with the other employees. He was very unclean in his habits and his clothing was frequently covered with cow manure and smelled of sour milk. He never wasted a nickel. He saved and hoarded and invested wisely. He purchased one piece of property in the suburbs of Ottawa with a two story house on it which he rented, and then he built a small cottage in which he lived. He had other investments in stocks and bonds.

Harry F. Lewis was a man about 60 years of age. His sister was the first wife of Frederick W. Kemp, and she died three years after they were married. Harry F. Lewis was twelve years old at the time Kemp and his sister were married, and Kemp and Lewis have been close intimate friends ever since. Kemp would frequently call him "Son."

The note and trust deed in controversy originated in April 22, 1929, as a result of a loan which Kemp made to the Lewises for the purpose of erecting a filling station. There seems to be no question but what the trust deed covering the filling station property was ample security for the \$5500.00 note which by its terms was due in five years.

The appellants, having abandoned their position that Frederick W. Kemp was not of sound mind at the time of the transaction involved herein and that he did not execute the



instruments connected therewith, rely upon the contention that there was a fiduciary relationship existing between Kemp and Lewis, and that the burden was upon Lewis to show that all of his dealings with Kemp were fair and honest and free of undue influence. One of the circumstances relied upon by appellants is found in the testimony of a Mr. Arnold and Mr. Godfrey, a pair of elderly financiers and real estate men who said that Mr. Lewis came to them and inquired if they were interested in purchasing the "Bellamy note," and that in pursuance to such inquiry they went to see Mr. Kemp who was found to be sickly but still perfectly competent to transact ordinary business, and that Mr. Kemp refused to accept fifty cents on the dollar for the note. Mr. Arnold went along with Mr. Godfrey supposedly to assist him in purchasing the note, but he testified that while at Kemp's home he agreed with Mr. Kemp that the paper was worth more than fifty cents on the dollar. The appellee in his argument stated that it appeared to be noteworthy that Mr. Arnold who accompanied Mr. Godfrey to be of some assistance to him was so uncooperative.

The appellant also calls our attention to the proof of the fact that sometime in the month of September, 1936, a package of paper was delivered by Mr. Lewis to Mr. Kemp. It is insinuated that Lewis secretly took from this package the papers involved in this controversy, but this circumstance is fully explained by the testimony of a Mr. Green, a lawyer, who had these papers in his office and turned them over to Mr. Lewis on May 13, 1935. which is the same date of the endorsement by Kemp as heretofore referred to.

The appellant also points to another circumstance that Mr. Lewis inquired of Taylor Wilhelm about the mechanics of making a will. It appears that Mr. Kemp did employ Mr. Roy





Wilhelm to prepare said will, but neither of the Lewises knew anything about its contents or its having been executed.

The proof also indicates that after the death of Kemp on the 22nd day of February, 1937, the plaintiff, Walter Pike, and other witnesses went to the filling station of Harry Lewis, and there interrogated him at length, and went back to the office of the attorney present and made a typewritten memorandum of all that was said. Those witnesses testified that Lewis was somewhat nervous and ill at ease; and that he admitted that he had transacted some business for Kemp; that they had been very close personal friends; that he knew something of the extent of the property owned by Kemp; and that he knew Kemp at one time was desirous of making a will. We do not find anything in this proof, when considered in connection with the other circumstances in evidence, that would give rise to the inference that Kemp ever reposed confidence in Lewis which he betrayed or violated in any manner.

On behalf of the appellant, little testimony was introduced with the exception of defendants' exhibit three which is as follows:

"State of Illinois. ) ss.  
County of La Salle.)

I, Josie Kemp, being first sworn state that Fred W. Kemp was my husband and that I knew that my husband held a mortgage on Frank Lewis' oil station on top of the hill north of Ottawa. And I knew that Frank Lewis and his wife helped my husband for a long time. I further state that one day several years before my husband died that Frank Lewis was at our home in West Ottawa and that my husband told Frank Lewis at that time that 'It was about time something was done with Frank's note, as no one could tell what might happen to my husband.' I was at work in and around the house and I saw my husband and Frank Lewis at the table and I saw the paper that they were writing on which was an envelope and I saw my husband sign the paper. I further state that I have been shown an envelope with the words 'O. K. Mfg. Co., P. O. Box 27, Ottawa, Illinois' on the left-hand corner and this envelope also has some writing on it in the handwriting of Frank Lewis



and below the writing is the name Fred W. Kemp. I further state that I know the handwriting of my husband and that that is the genuine handwriting of my husband. I did not see what became of the envelope but I never saw it in the house again and the first time that I have seen this envelope since the time stated above was on August 30, 1939, in the office of R. A. Green and I know that the envelope which I have just seen is the same envelope that I have just stated that I saw signed by my husband.

I further state that I have been informed that under the will of my husband that I am entitled to all of the personal property of his estate and I have been informed that if the note secured by the mortgage on Frank Lewis' oil station was collected and paid in to the Executor of my husband's estate that that property would be mine.

I further state that I have heard my husband say several times that he did not want the oil station and said he had no use for it.

I further state that I have been shown the note which was secured by the mortgage held by my husband on Frank Lewis' oil station and that there are two names on the back of that note and both of the names are 'Frederick W. Kemp' and that I know that both of said names are the genuine signatures of my husband.

I further state that I am making this affidavit of my own free will and have not been told what to say by any person.

Signed Jose Kemp.

Subscribed and sworn to before me  
this 30th day of August, 1939.

Olive Jorstad,  
Notary Public.

Seal

The burden of proof was upon the appellant to show that there was a fiduciary relationship between Frederick W. Kemp and Harry F. Lewis. Donavan v. St. Joseph Home, 295 Ill. 125; Sellers v Kincaid, 303 Ill. 216. There was a hearing of this cause before the Master in Chancery,



and he made his report finding that the appellants had not sustained the burden of proving a confidential relationship. This report was reviewed by the Chancellor, and he placed upon it his approval, and such will not be disturbed unless clearly against the weight of the evidence. Kuzlik v. Kwaany, 383 Ill. 354.

The evidence clearly shows that there was a strong tie of genuine affectionate friendship between Kemp and Lewis. Harry F. Lewis was the only person in the world, so far as the record indicates, that ever bestowed upon Kemp so much as a friendly visit. For fifty years, notwithstanding Kemp's peculiarities, his uncleanliness, and his barnyard odors, Lewis was a constant visitor and companion. He was really a true friend. When Kemp grew old and unable to get around, Lewis would run errands for him, such as buying groceries, cashing checks, paying bills, and during his last illness he called daily at his home and spent hours at his bedside. If any relative, and particularly the Pikes who seek to benefit by this proceeding, had anything to do with Mr. Kemp in his lifetime, the record fails to disclose it.

There is no proof that Lewis ever assisted Kemp or advised him with reference to any of his investments in stocks, bonds and notes or the purchase of real estate. There is nothing in the record to indicate or to give rise to the presumption of any fiduciary relationship between the parties. Mr. Kemp's giving to Mr. Lewis the \$5500.00 was obviously the outgrowth of a decent impulse on his part to show his appreciation for the only person who cared to be his friend and willing to associate with him. Our courts have repeatedly held that even though there may have been a close business relationship or a close and affectionate bond of friendship between parties, that such does not give rise to the implication that there was a fiduciary relationship. Wharton v. Roberts, 371 Ill. 546; Bennett v. Hodge, 374 Ill. 326.





Since the proof in this case fails to disclose any breached fiduciary relationship, we deem it unnecessary to extend this opinion by referring to and distinguishing the many cases cited in appellant's brief upon this subject.

In view of the foregoing, we are of the opinion that the Chancellor was correct in decreeing that the plaintiff was not entitled to the relief sought, and his decree in so holding, is affirmed.

JUDGMENT AFFIRMED.



In The  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
February Term, A. D. 1947

137

EDLER BELL,  
Plaintiff-Appellee,  
vs.  
CHARLIE MORRIS, ANDREW MATTOCKS,  
and RUTH MATTOCKS, husband and  
wife,  
Defendants,  
CHARLIE MORRIS,  
Defendant-Appellant.

3331A. 221

Appeal from  
Circuit Court of  
Kankakee County

Bristow, J.

This appeal comes from the Circuit Court of Kankakee County where a chancery and law case were consolidated, and a decree and judgment entered therein. The suit in equity was commenced by plaintiff-appellee, Mrs. Edler Bell. In it it is claimed, in the first paragraph, that in January, 1944, there was in existence a contract for the purchase of real estate which had been entered into between Edler Bell and defendants, Andrew and Ruth Mattocks. The real estate involved consisted of a twenty acre tract, more or less improved, situated in Kankakee County, Illinois. It is further claimed that this contract, on October 2, 1944, was assigned by Edler Bell to Charles Morris who was to act as Bell's agent or trustee to effectuate a completion of the payments;





that those payments were made by Morris with monies of Bell; and that he now refuses to recognize her rights under the contract. Paragraph 2 of the complaint prays that the Mattocks be required to recognize the plaintiff as the one having sole rights under the real estate contract. The third paragraph charges defendant Morris with being indebted to plaintiff in the sum of \$228.00 for money paid by plaintiff for the use and benefit of Morris. Paragraphs 4 and 5 similarly charge Morris with being indebted to plaintiff in the sums of \$600.00 and \$162.00, respectively. Paragraph 6 prays for an accounting growing out of a partnership operation between plaintiff and Morris wherein the parties engaged in the business of farming, selling chickens, eggs, milk, etc.

Defendant-Appellant Morris, in his answer, denies every allegation of the complaint, and claims that plaintiff is indebted to him because of damages resulting from gross inattention to the pigs, chickens, and farm crops.

During the trial the defendants were permitted to file a supplemental answer wherein it was pleaded that whatever agreement Morris had with Bell was verbal and not in writing, and, consequently, was contrary to the Statute of Frauds as set forth in Chapter 59, section 2 of 1945 Illinois Revised Statutes. They further alleged that the trust claimed by the plaintiff was verbal, and thus contrary to the Statute of Frauds as set forth in section 9 of Chapter 59 of the Illinois Statutes.

After a long hearing the chancellor arrived at the following conclusions: that defendant Morris should take nothing under his replevin action; that defendant Morris was



at all times the agent or trustee of plaintiff; that he should be ordered to reassign the real estate contract to plaintiff; that defendants Mattocks should be required to keep and perform said contract with plaintiff; that defendant Morris owed plaintiff \$114.25 as set forth under paragraph 3; that he owed plaintiff \$600.00 as claimed in paragraph 4; that as to the claims alleged in paragraphs 5 and 6, the equities were with the defendant Morris.

Plaintiff Bell's and Defendant Morris's version as to what transpired are very much in disagreement. The Chancellor, evidently, after seeing the various parties and witnesses, concluded Bell's recitals to be more worthy of belief. This apparently is what happened. After Bell negotiated the real estate purchase contract with the Mattocks, she became delinquent in her payments, but not until she had already paid upon the contract the sum of \$439.87. Her delinquency reached the sum of \$219.00 when defendant Morris entered into the picture. It seems that Morris owed Mrs. Bell the sum of \$250.00 and was unable to pay the same. However, he was solicitous of being of service to Mrs. Bell, and being friendly with the Mattocks, undertook to obtain an extension of time for the payment of the arrearage. The Mattocks were apparently hostile to Bell, for they would not receive a \$100.00 payment which Mrs. Bell sent to them by Morris, and said they did not want anything to do with Mrs. Bell. This occasioned the assignment from Bell to Morris of the real estate contract. By this assignment, Morris was to act as the agent for Bell to make arrangements for installment payments of the delinquent amount and to continue to make the



monthly payments as prescribed in the contract until the purchase price of \$2333.00 was liquidated. Then Morris, who had separated from his wife in Chicago, moved onto the premises in question, and he was to pay eighteen dollars per month to Mrs. Bell for board and room. Morris brought onto the place a coop of chickens and a couple of pigs and perhaps a couple of horses. He joined his chattels and assets with those of plaintiffs, and, from Christmas 1944, until August, 1945, they conducted a business of farming, growing pigs, and chickens, travelling to nearby markets and selling butter, eggs, and poultry. Plaintiff testifies that she spent fifteen hundred dollars in improving the property, building a new basement, corn crib, fencing, etc.

Defendant Morris denies about everything the plaintiff has had to say about the fact that it was her monies that provided the payments on the contract and other items of expenditures made by them on the farm. Morris testified that he had received \$1000. from his wife which was derived from the sale of a partnership store in Chicago, but a searching cross examination of Morris revealed that there were many inconsistencies and improbabilities in his statements which engendered much doubt as to his credibility. The trial court with his superior advantage in determining where the truth lies, we feel was correct in finding that the equities were with the plaintiff. There were a multitude of transactions between Morris and Bell over this period of time, but we deem it useless to recite them in detail and suffice it to say that we find no reason not to sustain the findings of the trial court.





The appellants in their brief say little about the propriety of the finding of the trial court on the replevin issue, and it is our feeling, too, that it should not be disturbed.

Appellant Morris on this appeal relies strongly and argues extensively that inasmuch as his undertaking with Bell was not in writing, the Statute of Frauds enjoins the assertion of any rights thereunder. Furthermore it is insisted that the relationship between the parties here brought about the creation of an express trust rather than a resulting trust, and if it is an express trust it of necessity must be in writing. Under the facts in this case we do not believe that the arguments made and authorities cited on this subject are applicable. The Statute of Frauds is to prevent fraud, and a Court of Equity will not permit the Statute of Frauds to be invoked to accomplish a fraud. It was Edler Bell who had paid the \$439.87 on the contract at time of her dealings with Morris; it was she who paid the delinquent account of \$219.00; it was she who made the monthly payments thereafter; it was she who spent fifteen hundred dollars in improving the property. It seems that it would be grossly inequitable for a court of equity to deny her the relief sought and allow Morris to benefit by what the Chancellor found to be his own fraudulent conduct. By virtue of plaintiff Bell's prior interest in the contract and her substantial payments under the terms of the contract, a resulting trust was created in her favor by operation of law, and same need not be in writing.

Mercury Club, et al. v. Keillen, et al., 323 Ill. 24,  
153 N. E. 753, 754.

The following is a list of the names of the persons who have been appointed to the various positions in the office of the Secretary of the Navy, and who have been assigned to the various divisions of the office.

Division of Naval Affairs  
Division of Naval Construction  
Division of Naval Education  
Division of Naval Medicine  
Division of Naval Ordnance  
Division of Naval Personnel  
Division of Naval Supplies  
Division of Naval Training  
Division of Naval Transportation  
Division of Naval Warfare

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Volume 2. Bogert, Trusts and Trustees, Sec. 461.  
page 1407.

Cogley v. Cogley, 338 Ill. 400, 170 N. E. 208

Furber v. Page. et al., 143 Ill. 622. 32 N. E. 444.

Link v. Emrich, et al., 168 N. E. 316, 336 Ill. 337.

John v. John, 153 N. E. 363, 322 Ill. 236.

Baugham v. Baugham, et al., 283 Ill. 55, 119 N. E. 49.

Crawford, et al. v. Hurst, et al., 299 Ill. 503,  
132 N. E. 521.

Cotton v. Wood, 25 Iowa 43, 46, 47.

Fisher v. Burgiel, et al., 382 Ill. 42, 46 N. E.  
2nd 380.

Ralfson v. Malone, 315 Ill. 275, 146 N. E. 169.

In view of the foregoing we are of the opinion that  
the decree entered by the trial court should be and is affirmed.

DECREE AFFIRMED.

Volume 8, pages 100-101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

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abstract

STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

October Term, A. D. 1947

A  
173

General No. 9542

Agenda No. 5

LOUISE WINSON, MILE CORLEY, )  
ROBERT HENRY, and O. E. )  
SHARPE, )  
Plaintiffs-Appellees, )  
-vs- )  
EUGENE FISCHER, )  
Defendant-Appellant. )

335 I.A. 222

Appeal from the  
Circuit Court of  
Christian County.

DADY, J.

This is a personal injury suit based on injuries received by the four plaintiffs in a "head-on" collision between two automobiles about 11:30 P.M., New Years Eve, December 31, 1945, in the City of



Pana.

The four plaintiffs filed but one complaint, consisting of separate counts as to each plaintiff. Each count charged the defendant with wilful and wanton misconduct in driving his car which was the proximate cause of and contributed to cause the collision. No count charged ordinary negligence. The complaint charged each plaintiff was in the exercise of due care, that Louise Winsen was a passenger in the car in which she was riding, "not operating and not a joint enterpriser in the operation of the same," and that the other three plaintiffs were guest passengers in the Fischer car. The answer of the defendant admitted he was driving such car, but denied that the plaintiffs were in the exercise of due care, and denied all other material allegations of the complaint. A jury verdict found the defendant guilty and allowed Louise Winsen \$5,000, Nile Corley, \$2,000, Robert M. Henry \$250. and O. E. Sharpe \$250. as damages. Judgment was entered in favor of the plaintiffs on such verdict. The defendant brings this appeal.

The defendant contends that the trial court erred in refusing to direct a verdict, or judgment notwithstanding the verdict, in favor of the defendant for the reason that the complaint does not allege "a case of wilful and wanton conduct," and the proofs do not show a case of wilful and wanton misconduct on the part of the defendant but do show that each plaintiff was guilty of wilful and wanton misconduct.



Each count alleged that the street on which the accident happened was covered with ice and was thereby slippery and dangerous, that the defendant was guilty of wilful and wanton misconduct in the operation of his car, which was the proximate cause of and contributed to the collision for the reason that he drove on such icy street at a speed of upwards of 60 miles per hour without having his car under control, and drove it to the left of the center of the highway without regard to the traffic on the highway, and that defendant's car then struck the Winson car causing the injuries in question. While the complaint is not in the form generally used, it is our opinion that it sufficiently charged an actionable case of wilful and wanton misconduct.

Defendant contends that said complaint is insufficient as to the plaintiffs Corley, Henry and Sharpe in that the complaint did not allege facts showing a guest status on their part. The complaint did charge as an ultimate fact that such plaintiffs were guest passengers in the Fischer car. We believe such charge was sufficient.

U. S. Route 29 known as Washington Street, runs easterly and westerly. There was no stop sign on Route 29. U. S. Route 51, known as Poplar Street, runs northerly and southerly, and its northerly end runs into and ends at Route 29. A stop sign on the east side of Route 51 was located about 15 feet south of Route 29. The tracks of the C & E I R R Co. run northeasterly and southwesterly and cross





Route 29 about 60 feet west of the center of the intersection of the two streets. The three sets of railroad tracks on such crossing are from 8 to 12 inches higher than the level of the pavement on either side, and the crossing was not level but "very rough." From such crossing easterly there was a down grade. The collision occurred on Route 29 about 30 feet west of the intersection at a time when the car driven by the defendant, Eugene Fischer was traveling easterly, and the car in which the plaintiff, Louise Winson, was riding was traveling westerly. The other three plaintiffs, Nile Corley, Robert M. Henry and O. K. Sharpe, were riding in the Fischer car. The undisputed proofs show they were guests of the Fischer car within the meaning of the statute. It is not contended otherwise. In his brief defendant says "all witnesses agree that the pavement was icy." The evidence shows all streets were slick or slippery.

Ned Winson, husband of Louise Winson, owned and was driving the car in which she was riding. He testified that before entering Route 29 he drove northerly on Route 51 and stopped at the stop sign; that he then saw defendant's car about a block distant to the west; that he then threw his car into low gear, then into second gear, and crossed to the north side of Route 29 and made a right angle turn to his left, and had started west on Route 29, traveling about eight miles per hour, and traveled westerly on the north side of Route 21 only a few feet when his car was struck by defendant's car and he



was rendered unconscious.

Mrs. Winson testified that her husband stopped his car at such stop sign, that she then saw the lights of the defendant's car about a block distant, and that her husband immediately drove to the north side of Route 29 and had made the left turn when the collision took place.

Shortly before the collision the defendant had spent some time at a tavern known as the Victory Tavern, located about six-tenths of a mile westerly of the point of the collision. Leonard Creamer, who was a friend of the defendant, was also at such tavern. The plaintiffs Corley, Henry and Sharpe and one Barry were also at such tavern, but all of them were strangers to the defendant. About 11:25 P. M. the defendant decided to drive to another tavern known as the Dutch Mill, which was located easterly of the point of the collision. Creamer asked the defendant if he and Corley, Henry, Sharpe and Barry could ride in the defendant's car and the defendant consented. All of them then got in the defendant's car and started for the Dutch Mill. The defendant drove. Creamer and Barry also rode in the front seat. Corley, Henry and Sharpe rode in the rear seat.

Sharpe testified that when defendant's car hit icy spots it swerved quite a little; that he, Sharpe, did not see the collision, but that in his opinion the speed of the defendant's car at the time





of the collision was about sixty miles per hour.

Corley testified that defendant's car swerved quite a bit on the ice; that he, Corley, said to the defendant, "take it easy, we don't have to get there so quick," but that defendant paid no attention; that when they crossed the railroad tracks defendant's car jumped and there was then the crash of the collision at a time when the defendant's car was going sixty miles per hour.

Henry testified that as they drove along the defendant's car swerved, but he did not say anything because he was afraid to; that defendant's car was going fifty or sixty miles per hour as they crossed the railroad tracks and seemed to fly over such tracks and that the collision then occurred.

A cab driver testified that he stopped his cab on a side street to let defendant's car pass, that such side street was about a block and a half west of the place of the accident; that as defendant's car passed the cab it was traveling about sixty miles per hour and he heard the crash of the collision. Two passengers in the cab testified that the speed of defendant's car as it so passed the cab was about fifty or sixty miles per hour.

The defendant testified that as he drove along he was able to see the paved portion of the highway in "some places" and was driving on his right hand side of the road; that nothing was said to him by any one in the back seat as to the manner in which he was driving,

of the collision was about eight miles away.

Carney testified that approximately one hundred miles from the

the fact that the collision, said to be between the two cars, was

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and nothing was said as to whether he should slow up and take it easy; that he was familiar with the railroad crossing; that just as he got to such crossing he saw the Winson car about 6 feet south of the stop sign on Route 51; that the Winson car was then moving and did not stop at the stop sign but crossed northwesterly in front of defendant's car at a time when defendant's car was on the railroad crossing; that defendant applied his brakes, but it did not do much good, and he immediately cut his car to his left to avoid a collision, but the collision occurred when the Winson car had just got to the center of the road; that the "biggest" portion of the Winson car was then north of the center of Route 29, and such car was then traveling northwest at a speed of about 8 to 10 miles per hour; that the left front of the Winson car and the right front of the defendant's car were involved in the collision; that when defendant's car had crossed the crossing it had reduced its speed and that at the time of the collision his car was going about 30 miles per hour.

Creamer testified that nothing was said by any one as to the manner in which the defendant drove his car; that the only time such car skidded was on a curve some distance westerly; that defendant drove on his right hand side of the pavement; that when crossing the railroad tracks the speed of defendant's car was about 30 miles per hour; that he first saw the Winson car south of the stop sign when the defendant's car was crossing the railroad tracks; that the



Winson car was then moving and did not stop at the stop sign, but pulled onto Route 29 at an angle, and its front wheels were astraddle the center of Route 29 at the time of the collision; that before the collision defendant applied his brakes a little bit and then swerved to the left; that as defendant's car crossed the railroad tracks it was going about 25 or 30 miles per hour, but at the time of the collision was going between 20 and 25 miles per hour.

Barry testified that he heard nothing said about the manner in which the defendant was driving; that as defendant's car crossed the railroad tracks its speed was about 25 to 35 miles per hour, and he couldn't say whether such speed was thereafter increased or decreased; that while crossing such tracks he first saw the Winson car and it was then turning onto Route 29; that at that time defendant "hit" his brake and started to swerve and the collision took place.

Ned Winson testified that he "drank some whiskey" that evening only at his brother's home. Mrs. Winson was not questioned as to whether she had anything to drink. Defendant testified he had been to two taverns, but drank nothing other than three cokes. As to the other plaintiffs, they had drunk some beer or whiskey. However, no one expressed the opinion that Ned Winson or any of the plaintiffs or the defendant was at all under the influence of liquor.

In passing on a motion of defendant for a directed verdict, and



It is not necessary to show that the defendant was negligent in the collision, but it is necessary to show that the collision was caused by the negligence of the defendant. The evidence in this case is that the defendant was driving at a speed of 40 miles per hour at the time of the collision, and that the collision was caused by the defendant's negligence. The evidence also shows that the collision was caused by the defendant's negligence, and that the collision was caused by the defendant's negligence.

The evidence in this case is that the defendant was driving at a speed of 40 miles per hour at the time of the collision, and that the collision was caused by the defendant's negligence. The evidence also shows that the collision was caused by the defendant's negligence, and that the collision was caused by the defendant's negligence. The evidence also shows that the collision was caused by the defendant's negligence, and that the collision was caused by the defendant's negligence.

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in passing on a motion of defendant for judgment notwithstanding the verdict, we are required to assume as true the evidence most favorable to the plaintiffs. (Hunter v. Troup, 315 Ill. 293.)

Assuming as true the evidence most favorable to the plaintiffs, it is our opinion that such evidence showed or tended to show the defendant was guilty of wilful and wanton misconduct as charged, which was the proximate cause of the collision and resulting injuries, and showed or tended to show that no one of the plaintiffs was guilty of wilful and wanton misconduct.

It is contended that the evidence shows that Mrs. Winson was engaged in a joint enterprise with her husband in the driving of her husband's car, that he was guilty of wilful and wanton misconduct, and such conduct of the husband was attributable to her and bars a recovery on her part. We believe the jury was justified in not believing the husband guilty of wilful and wanton misconduct. Moreover, the proofs do not show that Mrs. Winson was engaged in any joint enterprise. She was merely riding with and beside her husband in his car, and there is no evidence tending to indicate she could control or direct the movements of such car. (See Berg v. N.Y.C. & H.R.R. Co., 323 Ill App. 221).

It is our opinion that the trial court properly denied the motion for a directed verdict, and properly denied the motion for judgment notwithstanding the verdict.

In passing on a motion of judgment for judgment notwithstanding

the verdict, we are required to assume as true the evidence which

is favorable to the plaintiff. (Wright v. Wright, 100 Cal. 184.)

Accordingly we find the evidence most favorable to the plaintiff, if

it can be shown that such evidence shows as a matter of law that

defendant was guilty of willful and wanton misconduct as charged.

Which was the plaintiff's claim in the complaint and the evidence submitted

and shown to the jury that he was at the time of the

guilty of willful and wanton misconduct.

It is contended that the evidence shows that Mr. Wright

engaged in a habit of drinking and was intoxicated at the time of

her husband's death, and that he was guilty of willful and wanton misconduct.

and such conduct on the part of the husband was a proximate cause of his

death. It is claimed that the jury was justified in so

believing the husband guilty of willful and wanton misconduct.

However, the facts as set out in the complaint and the evidence submitted

are not sufficient to show that the husband was guilty of willful and wanton

misconduct in his death, and there is no evidence showing an intention

on the part of the husband to commit the act which caused the death.

Wright v. Wright, 100 Cal. 184.

It is our opinion that the trial court properly granted the

motion for a directed verdict, and properly denied the motion for

judgment notwithstanding the verdict.

It is next contended that the trial court erred in not granting a new trial on the ground that the verdict is against the manifest weight of the evidence, and on the ground that the court erred in granting defendant, Henry Horsthempke, doing business as Victory Tavern, a severance.

After a careful consideration of the evidence it is our opinion that we cannot properly say the verdict is against the manifest weight of the evidence.

Henry Horsthempke was made a party defendant to the complaint. On his motion and before the trial began the court allowed him a severance. It is our opinion that this is no concern of the defendant and the defendant cannot properly complain of the allowance of such severance.

It is contended that the damages awarded Louise Winson, Nile Corley and Robert Henry were excessive and that for this reason a new trial should have been given. Louise Winson was a registered nurse. From the time of the accident until the trial, a period of about 303 days, she was unable to follow her profession because of such injuries. She testified that in the accident one of her legs was broken, her right wrist was crushed and her right hand fractured. She was in the hospital from December 21st to March 15th on account of such injuries. Her hospital bill was \$668.00 and her doctor bill \$250.00. Corley had a leg broken at the knee. He was in the





hospital 53 days. His hospital bill was \$375.00 and his doctor bill was \$200.00. Henry had both ankles sprained and because of the accident he was confined to his bed for about two weeks. Since the accident he has had trouble in working because of his injuries. No doctor testified as to any of such injuries. However, none of such plaintiffs was cross examined as to injuries and their testimony in that respect is uncontradicted. We do not feel we can properly say that the damages allowed any one of said plaintiffs was excessive.

Plaintiff has made objection as to the giving of two instructions. We consider it sufficient to say there was no error in the giving of such instructions.

While the case appears unusual in that all four plaintiffs joined in the one complaint, and in that such complaint as to Louise Winson did not charge ordinary negligence, yet the Practice Act permits such procedure and it is our opinion that no reversible error has been shown.

The judgment of the trial court is affirmed.

Affirmed.

hospital at home. His present bill was \$100.00 and his present

bill was \$200.00. Twenty and eight months ago he was

the accident he was confined to his bed for about two weeks. Since

the accident he has had trouble in getting around at all times.

His doctor testified as to work of men injured. However, since it

such (injuries) was more provided as to injuries and how serious

in that respect. In general, it is not as serious as

say that the doctor allowed not one of his patients was serious.

His bill was more serious as to his (injury) and (injury).

He testified as to his (injury) and (injury) in the (injury).

of such (injury).

While the case before the court in this case (injury) (injury).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FOR THE SECOND DISTRICT.  
MAY TERM, A. D. 1947.

BERNICE A. MAYNES, )  
Appellant, )  
vs. )  
FRANK MAYNES, )  
Appellee. )  
\_\_\_\_\_  
FRANK MAYNES, )  
Appellee, )  
vs. )  
BERNICE A. MAYNES, )  
Appellant. )

338 I.A. 222

Appeal from the  
Circuit Court of  
Will County,  
Illinois.

WOLFE,-- P. J.

Bernice A. Maynes started a suit in the Circuit Court of Will County, against her husband, Frank Maynes, for separate maintenance, in which she alleged that they were living separate and apart without her fault, and that the defendant, Frank Maynes, deserted her on June 9, 1945. Frank Maynes filed his answer, and denied that they were living separate and apart for any fault of his, and filed a counterclaim for a divorce in which he alleges that Bernice A. Maynes deserted him without any fault on his part. The Court heard the evidence, both on the complaint and counter complaint and found that plaintiff was not living separate and apart from the defendant without her fault, and also found for

20. 11. 1901

the defendant in the counterclaim and dismissed both the original complaint, and the counterclaim for want of equity. A decree was entered accordingly, and Bernice A. Maynes and Frank Maynes have each perfected an appeal from this decree.

The abstract contains a statement by the Court for his reason in finding that neither the wife, nor the husband were entitled to a relief in a Court of equity. It appears from the evidence that the main trouble between the husband and the wife, is that the wife is a Catholic and he is a Protestant. The couple have one daughter, who was raised a Catholic, but married a Protestant. The father strenuously objected to the daughter marrying a Protestant, because as he said, "she would have the same kind of trouble and bickering that he has had, on account of the religious differences between him and Mrs. Maynes." Just why the husband and wife are living separate and apart, is difficult to decide from the evidence in the case. She states that she is willing to live with her husband, if he will return, but there is always a qualification in regard to her statement about the husband's return. No doubt, there have been bitter arguments back and forth between the husband and wife. At one time she took the lock off of the front door of their residence, and put on a different one, so that the husband could not enter the front way, but had to go to the back door to enter his own home. He says that he was vilely abused by the wife when he did enter. He claims that his work requires that he live in another City than Joliet; that he has prepared a home for his wife several times, and asked her to come to live with him, but that she has refused, because she did not want to move away





3.

from Joliet and her friends. She denies this. From the conflict in the evidence in this case, we are satisfied that the chancellor properly arrived at the conclusion that the plaintiff was not entitled to separate maintenance, and the cross complainant was not entitled to a divorce.

The appellant, Bernice A. Haynes, insists that she did not have a fair and impartial trial, because of the prejudice of the judge, and that he disqualified himself to hear the case. We think that under the evidence in this case, this point is immaterial, as he arrived at the proper conclusion, and that the evidence fully sustains his finding. We find no reversible error in the case, and the decree appealed from is affirmed.

Decree affirmed.



44297

GEORGE F. HAXTON and JESSYE  
HAXTON HARVEY,

Appellees,

v.

DANIEL HAXTON, CLARA HAXTON,  
RUTH STAIR, HEDWICK HAXTON,  
LEROY HAXTON, DOROTHY HAXTON,  
ISABELLE KIRK, AGNES FRASER,  
PAUL HAXTON, JAMES HAXTON,  
JAMES HAXTON, Jr., MYRTLE DAVIS  
and LEONARD BOSGRAF.

Defendants.

On Appeal of CLARA HAXTON,  
HEDWIG HAXTON, sued as HEDWICK  
HAXTON, JAMES HAXTON and  
LEONARD BOSGRAF,

Appellants.

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

333 I.A. 223

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

September 10, 1947, plaintiffs filed their complaint in chancery praying that a temporary injunction issue immediately and without notice restraining "Defendants, their agents, attorneys, servants or employees from in any manner exercising authority as officers and directors" of the James Haxton and Sons Company, an Illinois corporation, and "from making any distribution in whole or in part of any assets of said corporation, whether derived from terms of sale or otherwise, from altering, changing, amending, or adding to capital stock record book," etc., and to compel the delivery of the records to a receiver to be appointed by the court and to be held by the receiver until final decree. The complaint purports to be sworn to. On September 11, 1947, the court entered the following order: "On motion of attorney for Plaintiffs for issuance of a writ of injunction immediately and without notice, a proper showing having been made, it is ordered that a temporary injunction writ issue forthwith without notice and without bond and Defendants and each of them are

GEORGE E. HAXTON and JESSIE  
HAXTON HANNEY,  
Appellants,

v.

JOHN HAXTON, CLARA HAXTON,  
RUTH HALE, EDWIN HAXTON,  
LEWIS HAXTON, ROBERT HAXTON,  
LEWIS HAXTON, JAMES HAXTON,  
JAMES HAXTON, JR.,  
and LEONARD HAXTON,  
Respondents.

AN APPEAL OF CLARA HAXTON  
FROM THE CIRCUIT COURT OF  
HAXTON, JAMES HAXTON and  
LEONARD HAXTON,  
Appellants.

THE JUDGE OF THE CIRCUIT COURT OF THE COUNTY.

September 10, 1947, Appellants filed their complaint  
in chancery praying that a temporary injunction issue against  
appellees and without notice restraining appellees, their  
agents, attorneys, servants or employees from in any manner  
existing authority as officers or directors of the Haxton  
Haxton and Sons Company, an Illinois corporation, and from  
making any distribution in whole or in part of the assets of  
said corporation, whether derived from sales of assets or  
wise, from liquidating, dissolving, or winding up the  
stock record book," etc., and to enjoin the delivery of the  
records to a receiver to be appointed by the court and to be  
held by the receiver until final decree. The complaint was  
served to be sworn to. On September 11, 1947, the court  
entered the following order: "On motion of attorneys for  
Plaintiffs for issuance of a writ of injunction immediately  
and without notice, a proper showing having been made, it is  
ordered that a temporary injunction writ issue forthwith without  
notice and without bond and Defendants and each of them are

hereby commanded to desist and refrain from in any manner exercising authority as officers, directors or shareholders of James Haxton and Sons Company, from making any distribution in whole or in part, of any assets of said corporation, whether derived from terms of sale or otherwise, and to desist from all other acts as set forth in said writ of injunction." On the same day counsel for defendants entered the appearance of five of the thirteen defendants and served notice on counsel for plaintiffs that on September 12, 1947, they would move to dissolve the temporary injunction. The motion to dissolve was filed on September 12 and on the same day a motion was filed to strike the complaint to dismiss the cause on behalf of eleven of the defendants. September 17, an order was entered which states that on motion of counsel for five defendants to dissolve the injunction granted on September 10, that plaintiffs were represented by their counsel, and the court, having heard the arguments and being fully advised, it was ordered that the "motion to dissolve the temporary injunction be and it is overruled and denied" and that in the event an appeal was perfected, the bond be \$500. September 26, the appeal bond of five of the defendants for \$500 was filed and approved. It is from the order refusing to dissolve the temporary injunction that this appeal is prosecuted.

The allegations of the complaint so far as it is necessary to state them for the purpose of this appeal are that in 1904 or 1905 the James Haxton and Sons Company was incorporated under the laws of Illinois with its principal place of business in Chicago. That the original incorporators were James Haxton, Sr., James Haxton, Jr., and William Haxton. That the capital stock of the corporation was \$2,500 divided into 25 shares of the par value of \$100 each, of which 10 shares were made out

herely commanded to desist and refrain from any further  
 exercising authority as officers, directors or shareholders  
 of James Hutton and Sons Company, from making any contribution  
 in whole or in part, of any assets of said corporation, whether  
 derived from terms of sale or otherwise, and to desist from all  
 other acts as set forth in said writ of injunction. On the  
 same day counsel for defendants entered the appearance of five  
 of the thirteen defendants and served notice on counsel for  
 plaintiffs that on September 12, 1904, they would move to dis-  
 solve the temporary injunction. The motion to dissolve was  
 filed on September 12 and on the same day a motion was filed  
 to strike the complaint to dismiss the same on July 12 of  
 eleven of the defendants. September 12, no order was entered  
 which states that on motion of counsel for five defendants to  
 dissolve the injunction granted on September 12, that plain-  
 tiffs were represented by their counsel, and the court, having  
 heard the arguments and being fully advised, it was ordered  
 that the "motion to dissolve the temporary injunction be and  
 it is overruled and denied" and that in the event a writ  
 was perfected, the bond be \$1000. September 22, the writ was  
 of five of the defendants for \$500 was filed and removed. It  
 is from the order relating to dissolve the temporary injunction  
 that this appeal is prosecuted.

The allegations of the complaint so far as it is neces-  
 sary to state them for the purpose of this appeal are that in  
 1904 or 1905 the James Hutton and Sons Company was incorporated  
 under the laws of Illinois with its principal place of business  
 in Chicago. That the original incorporators were James Hutton,  
 Jr., James Hutton, Jr., and William Hutton. That the capital  
 stock of the corporation was \$2,500 divided into 25 shares of  
 the par value of \$100 each, of which 10 shares were made out



in the name of James Haxton, Sr., and certificates for 5 shares each were made out in the name of James Haxton, Jr., William Haxton and Harry McLean Haxton, but that the certificates were never physically delivered but retained in the stock book of the corporation. That James Haxton, Sr., was the father of James, Jr., William and Harry Haxton; that about 1921, Harry Haxton died leaving his widow, Jessye and 3 minor children, George F., Jessye, the plaintiffs, and Myrtle, surviving. That at the time of Harry Haxton's death, his son, George, plaintiff, was about 10 years old; that when George attained the age of 17 his grandfather, James Haxton, Sr., induced George to become an employee of the corporation. Among the inducements was the representation of the grandfather, that if George continued in the employ of the corporation until attaining the age of 21, the grandfather would deliver plaintiff, George, the 5 shares of the capital stock represented by the certificate in the name of George's father, Harry McLean Haxton, which the grandfather, James Haxton, declared he was holding for plaintiff, George, "in accordance with wishes" of George's father, Harry; that plaintiff, George, went to work for the company and continued in its employ from the time he was 17 years old and that at the time of the beginning of the suit, September 10, 1947, George was president of the corporation.

It was further alleged that upon George's attaining 21 years of age, he asked his grandfather about the five shares of capital stock which were then to be delivered to him; that "James Haxton, Senior, said: 'Don't worry about them, I have them for you;' that on or about April 12, 1936, the grandfather, James Haxton, Sr., died without delivering the certificates for the five shares to plaintiff, George, and that the certificate of stock made out in the corporate stock book for the five

in the name of James Haxton, Jr., and certified for 5 shares each were made out in the name of James Haxton, Jr., William Haxton and Harry McLean Haxton, but that the certificates were never physically delivered but retained in the stock book of the corporation. That James Haxton, Jr., was the father of James, Jr., William and Harry Haxton; that about 1911, Harry Haxton died leaving his widow, Jessie and 3 minor children, George W., Jessy, the plaintiff, and Willie, surviving. That at the time of Harry Haxton's death, his son, George, plaintiff, was about 10 years old; that when George attained the age of 17 his grandfather, James Haxton, Jr., induced Jessy to become an employee of the corporation. Among the inducements was the representation of the grandfather, that if George continued in the employ of the corporation until attaining the age of 21, the grandfather would deliver plaintiff, George, the 5 shares of the capital stock represented by the certificates in the name of George's father, Harry McLean Haxton, which the grandfather, James Haxton, testified he was holding for plaintiff, George, "in accordance with wishes" of George's father, Harry; that plaintiff, George, went to work for the company and continued in its employ from the time he was 17 years old and that at the time of the beginning of the suit, September 10, 1947, George was president of the corporation.

It was further alleged that upon George's attaining 21 years of age, he asked his grandfather about the five shares of capital stock which were then to be delivered to him; that "James Haxton, Senior, said: 'Don't worry about them, I have them for you';" that on or about April 12, 1948, the grandfather, James Haxton, Jr., died without delivering the certificates for the five shares to plaintiff, George, and that the certificates of stock made out in the corporate stock book for the five

shares had never been delivered. It was further alleged that when the grandfather died he was a widower leaving four children and several grandchildren, three of whom were the children of Harry Haxton who died about 1921. That the grandfather during his lifetime executed three different wills none of which had ever been offered for probate "as there was a grave question" as to his mental competency to execute the will. There are further allegations which we think it unnecessary to mention here except that the business of the corporation was operated continuously and that notice was given of a special stockholders' meeting to be held June 14, 1946, which notice was sent to George and Jessye, plaintiffs, and to Myrtle Haxton Davis, their sister. That Jessye and Myrtle executed their proxies naming William Haxton to represent their interests at the special meeting of the stockholders; that George attended the meeting in person as a stockholder. That shortly after William Haxton's death, George was elected president of the corporation.

It was further alleged that defendants refused to let plaintiffs examine the books and records of the corporation. That James T. Haxton, Vice-President, and Paul Haxton, Secretary-Treasurer, called a meeting of the board of directors of the corporation to be held September 9, 1947, at the office of the company to consider and take action which may be necessary to remove George (plaintiff) as president of the company and to elect his successor in the event of his removal or resignation and to consider the offer of purchase of the assets which had been made and if the proposed sale was approved, to adopt resolutions recommending that it be carried out and a special meeting of the stockholders held.

Some of the contentions of the defendants appealing

James had never been a director. It was further alleged that when the corporation filed its first annual report, James was not only a shareholder, but also a director, three of whom were the children of Harry Weston who died about 1911. That the corporation during its lifetime excluded James from all rights and privileges which had ever been offered for promotion. That there was a grave question as to his mental competency to operate the mill. There are further allegations which are made in unnecessary to mention here except that the business of the corporation was operated continuously and that notice was given of a special stockholders' meeting to be held June 14, 1916, which notice was sent to George and James, plaintiffs, and to Harry Weston Davis, their sister. These James and Harry Weston Davis are parties named William Weston to represent their interests at the special meeting of the stockholders; and that the plaintiff the meeting in person as a stockholder. That on the day after William Weston's death, George and James are parties to the corporation.

It was further alleged that defendant failed to 1st plaintiffs examine the books and records of the corporation. That James T. Weston, Vice-President, and Harry Weston, Secretary, called a meeting of the board of directors of the corporation to be held September 9, 1917, at the office of the company to consider and take action which may be necessary to remove George (plaintiff) as president of the company and to elect his successor in the event of his removal or resignation and to consider the offer of purchase of the assets which had been made and if the proposed sale was approved, to adopt resolutions recommending that it be carried out and a special meeting of the stockholders held.

Some of the contentions of the defendants appearing



are that the court erred in awarding the temporary injunction for the reason that (1) no notice was given, (2) no bond was given as the statute requires and (3) that the complaint was not verified.

Section 3, of chapter 69, Ill. Rev. Stats. 1947, provides that "No court or judge shall grant an injunction without previous notice of the time and place of the application having been given to the defendants to be affected thereby, or such of them as can conveniently be served, unless it appears from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice.

Section 9 provides: "In all other cases, before an injunction may issue, the plaintiff shall give bond in such penalty, upon such condition and with such security as may be required by the court or judge. Provided, bond need not be required when for good cause shown, the court or judge is of opinion that the injunction ought to be granted without bond."

Counsel for plaintiffs say that the allegations of the complaint are sufficient for the issuance of the writ of injunction without notice for the reason that it is expressly alleged that "the rights of the complainants would be unduly prejudiced if the injunction is not issued immediately and without notice." We think the contention cannot be sustained. There is no allegation that any of the assets of the corporation will be disposed of by defendants should notice be given. Plaintiffs further contend that it was proper to grant the injunction without bond, and in support of this say: "As previously shown, it must be presumed, that on the hearing below evidence was presented in support of plaintiffs' contention, and the court was of the opinion that bond need not be required

are that the court erred in awarding the temporary injunction for the reason that (1) no notice was given, (2) no bond was given as the statute requires and (3) that the complaint was not verified.

Section 2, of chapter 48, Wis. Stat., 1947, provides that "no court or judge shall issue an injunction without previous notice of the time and place of the application having been given to the defendants to be present in person, or agent of them as can conveniently be served, unless it appears from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be irreparably injured if the injunction is not granted immediately or without notice."

Section 3 provides: "In all other cases, before an injunction may issue, the plaintiff shall give bond in such penalty, upon such condition and with such security as may be required by the court or judge. However, bond need not be required when for good cause shown, the court or judge is of opinion that the injunction ought to be granted without bond."

Comment for plaintiffs that the allegations of the complaint are sufficient for the issuance of the writ of injunction without notice for the reason that it is expressly alleged that "the rights of the complainants would be irreparably injured if the injunction is not granted immediately and without notice." We think the contention cannot be sustained.

There is no allegation that any of the assets of the corporation will be disposed of by respondents should notice be given. Plaintiffs further contend that it was proper to grant the injunction without bond, and in support of this they say: "As previously shown, it must be presumed, that on the hearing below evidence was presented in support of plaintiffs' contention, and the court was of the opinion that bond need not be required



for good cause shown." There is no merit in this contention. No evidence was heard. There is no such statement to that effect in the order awarding the writ. Counsel for plaintiffs further contend that the verification of the complaint was waived but "in any event, this question is not before the court as the verification is no part of the pleading."

Section 3, above quoted, provides for the giving of a notice "unless it appears from the complaint or affidavit accompanying the same, that the rights of the plaintiff will be unduly prejudiced if the injunction is not issued immediately or without notice." We think it is elementary that where a motion for a preliminary injunction is applied for on the face of the complaint that the complaint must be verified. In the instant case there was no verification of the bill. The attempted verification following the signatures of the two plaintiffs to the complaint is as follows:

"State of Illinois )  
County of Cook ) ss.

"George F. Haxton and Jessye Haxton Harvey each being first duly sworn separately depose and say that they are of lawful age, that they have read the allegations contained in aforesaid complaint; that they understand them; that said allegations are true in substance and in fact, except as to the allegations on information and belief, and as to those, they believe them to be true in substance and in fact, and they each acknowledge that their signatures were subscribed to said Complaint.

"Sidney S. Eckstone  
"Notary Public."

We think each of these three contentions made by the appealing defendants must be sustained. The order of the court refusing to dissolve the preliminary injunction is reversed.  
ORDER REVERSED.  
Niemeyer, P. J., and Feinberg, J., concur.

for good cause shown." There is no merit in this contention.  
No violence was done. There is no such statement in the  
effect in the other respects of the bill. The bill is  
further content that the provisions of the bill are  
waived but "in any event, this question is not before the  
court as the verification is a part of the bill."  
Section 1, above quoted, provides for the issue of  
a notice "unless it appears that the complaint or petition  
accompanying the same, and the facts of the complaint and  
be fully justified if the petition is for a writ of habeas  
corpus or other writ." It is in the bill that  
where a motion for a preliminary injunction is made for or  
the face of the complaint that the complaint may be verified.  
In the instant case there was no verification of the bill. The  
alleged verification following the petition in the bill  
pleadings to the complaint is as follows:

"State of Illinois )  
County of Cook ) ss.

"George F. Hartman and Henry Nelson versus Mary Deane  
first duly sworn separately before me and a book open and  
lawful age, that they have read the allegations contained in  
alleged complaint; that they understand the same; that they  
allegations are true in substance and in fact, except as to the  
allegations on information and belief, and as to those, they  
believe them to be true in substance and in fact, and they make  
acknowledge that their statements were subscribed to and  
sworn to."

"Subscribed and sworn to before me  
this 1st day of June, 1906."  
Notary Public.

We think each of these three contentions made by the  
appealing defendants must be sustained. The order of the court  
refusing to dissolve the preliminary injunction is reversed.  
Wiley, J., and Feinberg, J., concur.

44303 )  
 ) Consolidated.  
44304 )

FIRST NATIONAL BANK OF CHICAGO,  
as Successor Trustee, etc.,

v.

BRYN MAWR BEACH BUILDING CORPORA-  
TION, a corporation, et al.,

On Appeals of THE FIRST NATIONAL  
BANK OF CHICAGO, as Trustee,

and

EDWARD E. GLATT and EDWARD  
V. TRAINOR,

Appellants,

v.

IRENE CASTLE ENZINGER,  
Appellee.

APPEALS FROM  
SUPERIOR COURT,  
COOK COUNTY.

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

September 19, 1947, The First National Bank of Chicago, as Trustee, by leave of court filed its petition in the foreclosure proceeding, praying (1) that its action in rejecting two offers to purchase the property be approved; (2) that the contract of September 15, 1947, executed by it and the Edgewater Beach Apartments Syndicate be approved, and (3) the approval of all other acts and doings, and the doings of the Trust Managers, etc. Answers were filed. The matter was heard before the chancellor without evidence, and on the statements and admissions made in open court, which are certified in the record, and on September 23, 1947, the court entered an order as follows:

"This cause coming on to be heard on the sworn petition of the liquidation trustee and the answers thereto, the court having heard the arguments of counsel and, being fully advised in the premises, the court finds that now, and until rent control is lifted, is not the time to sell the trust property,

control is lifted, is not the time to sell the trust property, in the premises, the court finds that not, and until rent having heard the arguments of counsel and, being fully advised of the litigation trustee and the answers thereto, the court "This cause coming on to be heard on the sworn petition court entered an order as follows:

certified in the record, and on September 22, 1947, the statements and admissions made in open court, which are heard before the chancellor without evidence, and on the Trust Managers, etc. Answers were filed. The matter was approval of all other acts and doings, and the doing of the water Beach Apartments Syndicate be approved, and (3) the contract of September 12, 1947, executed by it and the Bays- two offers to purchase the property be approved; (2) that the closure proceeding, praying (1) that its action in rejecting as trustee, by leave of court filed its petition in the fore- September 12, 1947, The First National Bank of Chicago, Mr. Justice O'Connor delivered the opinion of the court.

IRVING CATTLE BUSINESS,  
Appellee.

V.  
EDWARD E. GLATT and EDWARD  
V. THIMMER,  
Appellants.

and  
On Appeals of THE FIRST NATIONAL  
BANK OF CHICAGO, as Trustee,

BRYN MAWR BEACH BUILDING CORPORATION,  
a corporation, et al.,

FIRST NATIONAL BANK OF CHICAGO,  
as Successor Trustee, etc.,

44304 )  
( Consolidated.  
44303 )

and it is ordered that:

"(1) The offer of \$3,900,000.00 as increased to \$4,000,000.00 and the other offer of \$4,000,000.00 be and the same are hereby rejected, and the rejection thereof by the trustee be and is hereby approved; and

"(2) That the trustee be and is hereby directed not to submit any offers to the beneficiaries of its trust until after March 1, 1948; and

"(3) The trustees said petition is otherwise denied except that the court has not otherwise passed upon the third prayer of said petition."

It is from this order that the two appeals were taken. They were consolidated by this court.

The record discloses that The First National Bank of Chicago, as Trustee, filed a suit to foreclose the lien of a trust deed, given to secure a \$6,000,000 bond issue, against the Bryn Mawr Beach Building Corporation. A decree of foreclosure was entered, and afterward proceedings were had in the cause to approve a plan of reorganization. The plan was approved by the chancellor and affirmed by this court, 283 Ill. App. 267. The case was then taken to the Supreme Court, where the judgment of this court was affirmed. 365 Ill. 409.

In the opinion in this court (283 Ill. App. 267-273) the court said:

"Under the decree of the Superior court, entered February 20, 1934, in addition to each and every other provision made for the execution and enforcement thereof, the court reserved to itself full and complete jurisdiction of the cause for certain specified purposes, and 'for the purpose of entering such other or further order or orders not inconsistent with this decree as to the court may seem necessary



and it is ordered that:

"(1) The offer of \$2,500,000.00 as increased to \$4,000,000.00 and the offer of \$4,000,000.00 be and the same are hereby rejected, and the rejection entered by the trustee be and is hereby affirmed; and

"(2) That the trustee be and is hereby directed not to submit any claims to the beneficiaries of the trust until after March 1, 1934; and

"(3) The trustee said petition is otherwise denied except that the court has not otherwise passed upon the third prayer of said petition."

It is from this order that the two appeals were taken. They were consolidated by this court.

The record discloses that the First National Bank of Chicago, as Trustee, filed a bill to foreclose the lien of a trust deed, given to secure a \$500,000 loan issue, against the First National Building Corporation. A decree of foreclosure was entered, and afterwards proceedings were had in the court to approve a plan of reorganization. The plan was approved by the chancellor and affirmed by this court. 283 Ill. App. 207. The case was then taken to the Supreme Court, where the judgment of this court was affirmed. 307 Ill. 407. In the opinion in this court (283 Ill. App. 207-213) the court said:

"Under the decree of the superior court, entered February 20, 1934, in addition to such and every other provision made for the execution and enforcement thereof, the court reserved to itself full and complete jurisdiction of the case for certain specified purposes, and 'for the purpose of entering such other or further order or orders not inconsistent with this decree as to the court may seem necessary



or proper."

The record discloses that at the foreclosure sale the title to the property was in The First National Bank, as Trustee.

The pertinent provisions of the liquidating trust agreement, which was approved by this court and by the Supreme Court, as above stated, are:

"Article I - The name of this trust shall be Edgewater Beach Apartments Liquidation Trust, and its object shall be the sale and liquidation of the Trust Property \* \* \* as soon as may be practicable.

"Article II - And said Trustee shall have full power to grant options to purchase, to contract to sell and to sell the Trust Property \* \* \* upon such terms and to such person, firm or corporation, as the Trustee may deem advisable: \* \* \* provided, however, that the Trustee shall not so long as the Trust Managers hold office, \* \* \* make any \* \* \* sale \* \* \* or other disposition of any of the property \* \* \* except upon written order signed by the Trust Managers as hereinafter provided, it being the intention hereof that the affairs of this trust shall, except as herein otherwise specifically provided, be directed in all things by such Trust Managers; and provided, further, that the Trustee shall not, prior to the termination of this trust, sell or otherwise dispose of the whole or the bulk of the Trust Property unless, not less than twenty (20) days prior to such sale or other disposition, the Trustee shall mail to the Certificate Holders, \* \* \* a notice in such form as shall be designated by the Trust Managers, or by the Trustee if there be no Trust Managers," specifying the property to be sold, terms, conditions, "and no such sale or other disposition shall be made if, within twenty (20) days

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from the date of mailing such notice the holder or holders of thirty-three and one-third per cent ( $33\frac{1}{3}\%$ ) or more of the preferred units outstanding \* \* \* shall lodge with the Trustee written objections to such proposed sale or other disposition.

"Article XX - This Trust shall terminate upon the sale of all the Trust Property. This trust may also be terminated at such time as the Trust Managers, if there be Trust Managers, otherwise the Trustee, in their or its sole discretion \* \* \* may determine," etc.

Some time after the approval of the liquidating trust by the courts, some offers were made to purchase the property, which is known as the Edgewater Beach Apartments, and the Trustee filed petitions in the foreclosure proceeding submitting such offers.

The First National Bank, as Trustee, and Edward E. Glatt and Edward V. Trainor contend that the court erred in its order by which he directed the Trustee not to submit any offer to the beneficiaries of the trust until after March 1, 1948, for the reason that the court had no jurisdiction of this question; that the sole power was in the certificate owners under the express terms of the liquidation agreement the material provisions of which we have above quoted. And they quote, "So long as a trustee is exercising discretionary powers conferred upon him, honestly and reasonably, a court of equity has no right to interfere." Altschuler v. Chicago City Bank & Trust Co., 380 Ill. 137. We think it clear this contention must be sustained. When a bid is received by the Board of Managers or Trustee that is at all apparently reasonable, notice must be given to the beneficial owners, and unless at least  $33\frac{1}{3}\%$  of the certificate owners object,

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the property may be sold.

The contention of Mrs. Enzinger is that the order was proper, and that this was not the time to sell the property. What we have just said disposes of this contention - the power to sell was solely in the hands of the beneficial owners. Her counsel further contend that "The First National Bank of Chicago as Trustee submitted to the jurisdiction of the Court below, the matter of the sale of the property in the Trust." One of the reasons advanced is that the written order signed by the chancellor, from which the two appeals were prosecuted, bears on the reverse side the signature of counsel for the bank. Obviously, there is no merit in this point. Counsel then point to a number of the petitions filed by the Trustee in support of their contention that the Trustee submitted to the jurisdiction of the court, and other arguments are made, which we have considered, but we think it clear there is no merit in any of them.

Counsel for Glatt and Trainor contend that "it was the duty [of the court] to permit the sale at \$4,000,000 or better and it clearly erred in the entry of the order denying such relief. \* \* \* It follows that the order should be reversed with directions to accept the bid and to enter into the contract of sale, in such form as this court may direct."

We think this contention cannot be sustained. The record discloses that on July 21, 1947, the Trustee filed a petition setting up offers to purchase the property, and that within the time allowed 54% of the certificate holders objected, but thereafter, on the last day, some of them withdrew their objections, so that there was then less than 33-1/3%. The Trustee had entered into a contract with the Edgewater Beach Apartments Syndicate to sell the property

the property may be sold.

The contention of Mrs. Wainwright is that the order was proper, and that this was not the time to sell the property.

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owners. Her counsel further contends that "The First National

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We think this contention cannot be sustained. The

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for \$4,000,000, and it is alleged in the petition of September 19, 1947, that Glatt advised counsel for the Trustee that his clients might be willing to submit a new offer if the pending offers were rejected. It is further alleged that written notice was given by the Trustee, rejecting the two offers, and the record discloses that afterward the Edgewater Beach Apartments Syndicate withdrew its offer and is not contesting any matter. The record further discloses that a number of bids were made for the property, which provided that if higher bids were made the offeror had the right to raise his bid, and if he did so, the property would be sold to him. It is agreed that this provision in the bids chilled the bidding.

The written offer made by Glatt, we think, is different in a number of respects from the oral one he made in open court on the hearing. At that time counsel said: "When I received a notice of an offer of \$3,500,000 by Maurice Kamm's client Mr. Glatt, I came into court to oppose it on the ground that he wanted the right to meet other bids. I have always taken the position that meeting other bids tends to chill bidding. When the offer of \$3,900,000 was made, representing the beneficiaries, I went to Maurice Kamm and asked him to get his client to increase the bid. I told him I was going to disregard this meeting provision. I induced Maurice Kamm to let his client make an offer of \$4,000,000 on condition if higher bids were made we should be notified. I was waiting to hear the vote. If the vote was favorable I would have gone further. I finally succeeded in inducing Mr. Glatt to make an offer in open court to pay \$4,000,000 without any privileges and with no strings attached. I have a cashier's check for \$200,000 to guarantee a \$4,000,000 bid without privileges. I want to say

for \$4,000,000, and it is alleged in the petition of September 19, 1947, that Glatf advised counsel for the Trustee that his clients might be willing to submit a new offer if the pending offers were rejected. It is further alleged that written notice was given by the Trustee, rejecting the two offers, and the record discloses that afterward the Bidgewater Beach Apartments Syndicate withdrew its offer and is not contesting any matter. The record further discloses that a number of bids were made for the property, which provided that if higher bids were made the offeror had the right to raise his bid, and if he did so, the property would be sold to him. It is agreed that this provision in the bids chilled the bidding.

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to your Honor that this trustee has acted faithfully and honestly. \* \* \* The present offer of \$4,000,000 by Mr. Glatt contemplates the possibility of an auction. We are willing that an auction be held either in this court or any other place."

Counsel for the Trustee say that to avoid litigation which might be incurred, they rejected both the syndicate and the written offer of Glatt, and under the state of the record we think this action cannot be criticized. Counsel further say: "The Trustee desires to submit the new Glatt offer to the preferred certificate holders, and it joins with the Glatt appellants in urging that the chancellor's order prohibiting such submission of that offer be reversed and the Trust Property be sold on those terms, if not disapproved by the beneficiaries."

Obviously, the last offer made by Mr. Glatt cannot be approved under the liquidation agreement, unless it is submitted to the beneficial certificate owners.

The order of the Superior court of Cook county in so far as it directed the Trust not to submit any offers to the beneficiaries of the Trust until after March 1, 1948, is reversed. In all other respects it is affirmed.

ORDER REVERSED IN PART AND  
AFFIRMED IN PART.

Niemeyer, P. J., and Feinberg, J., concur.

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the Trust Property be sold on those terms, it is not disapproved  
by the beneficiaries."

Obviously, the last offer made by Mr. Glatf cannot be  
approved under the litigation agreement, unless it is sub-  
mitted to the beneficiary certificate holders.  
The order of the Supreme Court of Cook County in so  
far as it directed the Trust not to submit any offer to the  
beneficiaries of the Trust until after March 1, 1948, is  
reversed. In all other respects it is affirmed.

ORDER REVERSED IN PART AND  
AFFIRMED IN PART.

Klemmeyer, F. L., and Weinberg, J., concur.

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C.A. 3-3-48

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STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT  
OCTOBER TERM  
A. D. 1947

Term No. 4706

Agenda No. 4

WILLIAM MILHAHN et al.,  
Plaintiffs-Appellants,  
vs.  
WHITEWAY OIL COMPANY, an  
Illinois Corporation, et al.,  
Defendants-Appellee

Appeal from the  
Circuit Court of  
Wayne County

343

333 I.A. 3281

BARTLEY, P.J.

Plaintiffs instituted a suit against the defendants for an accounting, for discovery, appointment of a receiver, and incidental relief. A complaint was filed February 10, 1945 by a number of stockholders of defendant Whiteway Oil Company, on behalf of themselves and others similarly situated, against the officers and directors of said corporation, because of alleged mismanagement, fraud and failure to protect the rights of defendant company. The New Penn Development Company and Ward A. Wickwire were made defendants to the complaint because they had or claimed certain assets of defendant oil company which were in their possession and control. On November 7, 1946 at the close of plaintiffs evidence, the court on motion, dismissed the amended complaint as to defendant Ward A. Wickwire and later on an appeal by him was filed which is the subject of another appeal in this court, so that whatever the situation is as regards Ward A. Wickwire, it is not before the court in this case.

On January 31, 1947 the court entered two decrees, one of which was in favor of the defendant New Penn Development Corporation and the other in favor of the defendants officers and directors of the Whiteway Oil Company, dismissing the amended





complaint for want of equity.

Count 1 of the complaint alleges among other things that the Whiteway Oil Company is insolvent, has paid no dividends or other profit to the stockholders; that the company through its officers and directors has failed to account for the assets of the company or to exhibit the books and records to plaintiffs; that certain oil and gas leases totalling 4748 acres were held and possessed by the company in 1939 when it began business; that three producing oil wells were located thereon and several others have been drilled since then and that great quantities of oil have been removed from said leases and some of the leases have been sold by the officers and directors who refused to furnish information to plaintiffs but concealed and diverted the assets and gains to certain stockholders; that the officers and directors are conspiring with persons unknown, to deprive plaintiffs of their share of profits and rights therein, and are conspiring to distribute money, profits and assets belonging to plaintiffs to other persons. This count prays for the appointment of a receiver, an accounting and discovery of assets.

Count II, realleges most of the allegations of Count 1 and alleges the defendants have made numerous sales of capital stock of the Whiteway Oil Company without consideration and without proper authority and without accounting for the proceeds thereof; that \$50,000 in cash was received by the Whiteway Oil Company from J. A. Barnes and that the cash from this transaction has not been accounted for by defendants. The prayer of this count is the same as Count I.

Count III, realleges most of the allegations of Count I, and charges mismanagement and fraud on the part of defendant officers and directors; that the company has sold without consideration, capital stock contrary to the Illinois Securities Act; that the corporation has failed to file annual reports and pay its corporate taxes; that the company has not maintained a place of business and



that the directors and officers have made fraudulent sales of the capital stock and assets of the company for their own benefit to the exclusion of other stockholders. This count prays that officers and directors be removed from their offices; that an election be held for new officers and directors under the supervision of the court and that a receiver be appointed.

Count IV realleges most of the allegations of Count I and alleges that on January 16, 1940 the Whiteway Oil Company assigned all its leases and other assets to J. B. Barnes and was to receive \$50,000 in cash and \$250,000 in oil payments from oil produced thereon; that the Whiteway Oil Company appointed J. B. Barnes as its trustee on July 21, 1940, with the right to collect \$250,000 from oil produced for and on behalf of the Whiteway Oil Company; that said transfer was not ratified by the stockholders; that execution of the trust agreement was concealed from the stockholders and J. B. Barnes paid no consideration therefor; that it was a fictitious transfer to defraud the stockholders and that at the time of said agreement, J. B. Barnes was insolvent; that Barnes received valuable oil leases and wells without payment of any consideration; that said leaseholds and other assets are now claimed by the defendant New Penn Development Corporation, through a deal made with Ward A. Wickwire and J. B. Barnes. This count prays for an accounting and that the defendants be ordered to pay plaintiffs, or to the Whiteway Oil Company, amounts found to be due on accounting; that defendants pay to the plaintiffs or the Whiteway Oil Company the unpaid consideration of the transactions; that the defendants perform all acts and obligations imposed upon them or any of them by virtue of the allegations in the count and that the defendants or any of them receiving benefits from said transactions, pay the value of said benefits to Whiteway Oil Company or to plaintiffs.

The amended answer of defendants took issue on all the material questions of fact involved, insofar as related to any possible liability.





Examination of the record of the case indicates that in the year of 1938 one H. E. Sloan assembled a large block of oil and gas leases in the lands of Wayne and White Counties. He entered into a promotional scheme to sell these leases. One portion of acreage he held and intended to drill and develop himself which was designated as the "Sloan Drilling Block". He sold some leases thereon and also proposed to form a corporation to hold the leases he developed, and he solicited and received funds which were evidenced by receipts which were later to be exchanged for stock in the Corporation. Later he found he would not be able to obtain leases on all the lands embraced within his so-called "drilling block". To increase his sales, he then incorporated some other acreage into the "drilling block" by means of so-called "pooling agreements". He also held at lower prices, leases which were called "out-side acreage". He also sold small blocks of leases to other groups, although he did not dispose of all of his holdings. Most of the parties to this lawsuit were participants in one or more of Sloan's promotional schemes.

Sloan began to develop his so-called "drilling block". He drilled a Phil Walker No. 1 well which produced oil; he commenced drilling the Cox No. 1 well, when it developed that he had not discharged his obligations and leases were likely to be lost through lien foreclosures and other actions by creditors. An investigation was made by investors who had made rather large investments, including some of the defendants to this lawsuit. (A. P. Schmitt, Clayton A. Todd, C. H. Freistat, H. L. Freistat and J. W. Fairbairn) As a result, a suit in Chancery was filed in the Circuit Court of Wayne County and A. P. Schmitt was made Receiver to hold properties and complete the Cox well. The Receiver had authority to borrow money for this purpose and he issued Receiver's notes and certificates and completed the well as a producer of oil and gas. The Receivership lasted from November 29, 1938 to February 9, 1939, during which period a settlement was



worked out with Sloan. A trust agreement was prepared and circulated among the various owners of leases in the "drilling block" whereby, P. J. Franz, J. W. Fairbairn, C. H. Freistat, A. V. Todd and F. J. Budelier were nominated Trustees for the lease owners who joined in the Agreement. These Trustees were to hold title to the leases owned by the respective individual owners who executed the trust agreement and to make settlement with Sloan. Most of the owners of leases in the "drilling block" joined in this arrangement. When same was consummated, the Receivership was ended.

The settlement provided that Sloan's debts and obligations with reference to the "Sloan drilling block" and his various other obligations were assumed by the Trustees. Sloan was to assign to the Trustees certain of his unsold leases in the "drilling block" syndicates and "out-side acreage". Some leases he was permitted to retain. It was impossible to determine his exact holdings without expenditure of considerable time and money, so that to be safe in taking assignments from Sloan, blanket assignments were taken which included over-lapping leases that had been previously assigned by Sloan to others. The Trustees held title and operated the producing leases for a short time. At the same time, defendant Whiteway Oil Company was being incorporated. The Chapter was issued on February 23, 1939 and stock was issued to investors who participated in the trust agreement on a ratio of two shares for each \$1.00 invested, and to some for services rendered during the period of Receivership and Trusteeship.

The Trustees assigned the leases to the Whiteway Oil Company and described the acreage as it was described in the assignments made by Sloan to the Trustees. Later it was learned that some of these leases were owned by other parties and releases and quit-claims were made by the corporation from time to time to the proper owners. As a result of the efforts of various interested parties, including the defendant officers, Whiteway Oil Company



was an existing corporation holding leases previously owned by participants in the trust agreement, as well as additional leases acquired from Sloan.

Whiteway Oil Company proceeded to operate until November 1939 when the corporation became indebted to the extent of \$50,000 and it appeared impossible to carry on its affairs and operations. Suits were being filed. Directors were authorized by shareholders to sell the Wayne County holdings for \$300,000, all but \$50,000 to be payable out of 3/32 of the oil, although no sale could be made. However, a sale was made to J. B. Barnes for \$50,000 cash plus \$250,000 payable out of 3/32 of the Wayne County leases and \$100,000 payable out of 3/32 of the White County leases. The sale was approved by the shareholders after the contract had been amended to permit Barnes to pay \$25,000 cash and \$25,000 in notes. Whiteway Oil Company was obligated to deliver to Barnes, full 7/8 leases, but could not do so since one, Goode, owned an over-ride in the Cox well which could not be acquired. To prevent a failure of the sale, Whiteway appointed Barnes Trustee of its 3/32 oil payment, with authority to deduct from the proceeds an amount each month equal to the dollar proceeds accruing to the Goode over-ride, and then to remit the balance to Whiteway.

Barnes then formed a drilling company and began drilling and development operations. He paid \$25,000 cash and gave notes aggregating \$25,000 which Whiteway Oil Company discounted at the bank in Fairfield, Illinois. His drilling company ended in bankruptcy. It was then discovered that his financial backing was furnished by Ward A. Wickwire and Barnes turned the leases over to him, who in turn turned them over to New Penn Development Corporation for a valuable consideration, all of which were subject to the oil payment interest of the Whiteway Oil Company.

When Barnes assigned to Wickwire, he failed to resign as Trustee. A suit was brought against Barnes to terminate the Trust which was successful. No accounting could be had against him be-





cause he was outside the State of Illinois and could only be served by publication. By virtue of the sale to Barnes, Whiteway Oil Company was able to pay most of its obligations and still hold the oil payment interest which would produce income if the leases were productive, and some were. At the time suit was instituted, Whiteway Oil Company had paid its obligations including the \$5,000 Barnes note and for the first time, was in a position to receive for distribution, the proceeds of the reserved oil payment from certain leases which had become producers of oil and gas.

We have diligently examined the abstract and briefs of the respective parties here and the foregoing represents a general resume of the situation. In view of the manner of presentation of the briefs of the respective parties, it would be an unending task to enter into a discussion of the various evidentiary facts.

Various well known propositions of law are advanced by the appellants such as: The directors of a corporation are trustees of the business and property of the corporation for the stockholders and owe the utmost fidelity to the interests of the stockholders; any profit or benefit received by a director, directly or indirectly, in violation of his trust, must be accounted for and shared with the other stockholders; in cases of fiduciary relations, the burden is upon the person obtaining the advantage, to vindicate the bargain or profit from any shadow of suspicion and to affirmatively show that it was fair and reasonable in all respects, and courts will scrutinize the transaction with great severity. The propositions advanced are either not supported by the evidence in the cause or are not applicable. All questions of fact have been resolved adversely to the appellants by the trial judge who heard and saw the witnesses. Under these circumstances, we cannot disturb the findings of the chancellor unless we are of the opinion that they are manifestly and palpable wrong. (Hall vs. Pittenger, 356 Ill. 135) In our opinion the conclusions as to the facts upon which the chancellor dismissed the complaint



for want of equity are not manifestly and palpably wrong nor contrary to the weight of the evidence.

We have examined and considered all the errors assigned and we find no error in the record. The decrees of the Circuit Court of Wayne County are affirmed.

AFFIRMED.

JUDGES SMITH AND CULBERTSON CONCUR

NOT TO BE PUBLISHED IN FULL

FILED

JAN 26 1948

*William R. Brown*

CLERK OF THE APPELLATE COURT  
FOURTH DISTRICT OF ILLINOIS



43983

THOMAS G. McBRIDE and GEORGE E. BILLETT,

Plaintiffs - Appellees,

v.

NAT F. GRUSIN, SYLVIA GRUSIN, his wife,  
and GRUSIN INVESTMENT CO., INC., a  
corporation,

Defendants - Appellants

and

SYLVIA ROSENBERG, H. J. ROSENBERG, her  
husband, PEARL GRUSIN, MAYER GOLDBERG, as  
Administrator, with the will annexed of  
the estate of MICHAEL (ISAAC) GRUSIN  
deceased, LIBERTY NATIONAL BANK OF CHICAGO,  
a national banking association as Trustee  
under the provisions of a trust agreement  
dated October 1, 1940 and known as Trust  
No. 3022 under the deed in trust from  
Michael Grusin dated October 9, 1940,  
recorded October 15, 1940 as Document No.  
12562922 and under the deed in trust from  
Michael Grusin dated December 15, 1941, as  
Document No. 12814244, and under the deed  
in trust from Michael Grusin dated July 21,  
1942, recorded July 21, 1942 as Document No.  
12929020, WILLIAM A. WOLFGAM and GRACE D.  
WOLFGAM,

Defendants - Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. PRESIDING JUSTICE LEVE DELIVERED THE OPINION OF THE COURT.

Plaintiffs, attorneys, instituted proceedings in  
chancery to recover fees alleged to be due them from their clients  
defendants Nat F. Grusin, Sylvia Grusin, his wife, and Grusin  
Investment Co., Inc., a corporation, and to foreclose attorney's  
liens upon certain property held in trust and recovered by  
plaintiffs as attorneys for defendants.

Upon denial of defendants' motion to strike the petition,  
hereinafter called "complaint", and their failure to answer the  
complaint, a summary decree ("judgment") was entered on June 18,  
1946, which found there was due plaintiffs Thomas G. McBride and  
George E. Billett the sums of \$6,365.25 and \$1,721.33, respectively,





from defendants Nat. F. Grusin, Sylvia Grusin, his wife, and Grusin Investment Co., Inc., a corporation.

The decree further provided that upon defendants' failure to forthwith pay the sums found due plaintiffs within five days, "execution may issue thereon as upon a judgment at law"; that plaintiffs have valid attorney's liens for the amount due plaintiffs respectively upon the right, title, claim and interest of defendants to all the real and personal property described in the complaint; and that the court reserves jurisdiction of this cause for the purpose of enforcing the plaintiffs' attorney's liens by further proceedings.

Subsequently, on September 24, 1946, a supplemental decree was entered directing a sale by a master in chancery of the interest of the defendant Nat F. Grusin as beneficiary under a certain trust, and providing for distribution of the assets.

Defendants Nat F. Grusin, Sylvia Grusin, his wife, and Grusin Investment Co., Inc., a corporation, filed their notice of appeal on October 7, 1946. In this court plaintiffs made a motion to dismiss the appeal as to certain orders entered June 7, 1946 and June 18, 1946, including the summary decree on the ground that the appeal was taken after the expiration of ninety days from the entry of the decree of June 18, 1946, contrary to Illinois Revised Statutes 1945, Civil Practice Act, sec. 76, ch. 110, paragraph 200. Plaintiffs' motion to dismiss the appeal as to the foregoing orders and the decree of June 18, 1946 was taken with the case.

Defendants contend that the appeal presents for review all the orders and decrees which were entered in the instant case.

The record discloses that the complaint was filed April 17, 1946. Defendants were duly served with summons and entered their appearance. No answers having been filed by defendants, the

From September 24, 1941, to October 1, 1941, the

United States Government has been

the United States Government has been

to provide for the United States Government

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plaintiffs moved that defendants be defaulted, whereupon the court ordered that they file their answers by June 6, 1946. Defendants filed a motion to dismiss. On June 7th, after a hearing was had upon defendants' motion to dismiss the complaint, an order was entered denying defendants' motion to dismiss and directing them to file their respective answers to the complaint within seven days.

Upon leave of court, on June 7, 1946 plaintiffs filed their motion and affidavit for summary decree ("judgment"). Defendants were directed to file their affidavit of merits to this motion within seven days, and the matter was set for hearing on June 18, 1946.

It further appears from the record that defendants failed to file their answers to the complaint or their affidavit of merits to plaintiffs' motion and affidavit for summary decree. Thereupon the court, on June 18, 1946, entered an order finding the principal defendants to be in default and taking the complaint as confessed.

We think the decree of June 18, 1946 terminated the litigation between plaintiffs and defendants Nat F. Grusin, Sylvia Grusin, his wife, and Grusin Investment Co., Inc., a corporation on the merits. It not only determined the sums due each of the plaintiffs from these defendants for legal services but also decreed that plaintiffs had valid attorney's liens upon the rights of those defendants in the property described in the complaint and the exhibits attached thereto. Jurisdiction was retained by the court only for the purpose of enforcing the attorney's liens. No matter of substantial controversy between the parties was left for future determination. The decree of June 18, 1946, was, therefore, final and appealable. (Rettig v. Zander, 364 Ill. 112; Brauer Supply Co. v. Truck Co., 383 Ill. 569;

plaintiffs moved for judgment on the pleadings, contending that the court ordered that they file their answers by June 1, 1946. Defendants filed a motion to dismiss. On June 20, 1946, the court ordered that the plaintiffs' motion to dismiss be denied, and an order was entered denying defendants' motion to dismiss and directing them to file their responsive answers to the complaint within seven days.

It was found by the court, on June 7, 1946, that defendants filed their motion and affidavits in support thereof (Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 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998, 999, 1000).

It further appears from the record that defendants failed to file their answers to the complaint or their affidavits of denial to plaintiffs' motion and affidavits for summary judgment. Therefore the court, on June 18, 1946, entered an order granting the plaintiff's motion to file its answer and stating the complaint as confessed.

On June 18, 1946, following the litigation between plaintiffs and defendants and the court's order, plaintiffs, his wife, and certain investment co., Inc., a corporation on the record, it was only determined that each of the plaintiffs from whom defendants the same money had also received their money and also plaintiffs' share from the rights of those defendants in the money, committed to the complaint and the certain investment co., Inc., application was retained by the court only for the purpose of retaining the plaintiffs' share. It was also determined that the share of the parties was not for future consideration. The share of June 18, 1946, was, therefore, final and irrevocable. (Exhibit 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).



Groves v. Farmers State Bank, 368 Ill. 35.)

The time limitation in section 76 of the Civil Practice Act, which provides that an appeal shall be prosecuted within ninety days from the entry of the order, judgment and decree, complained of, is a statute of limitation. (Bradford Supply Co. v. Waits, 392 Ill. 318), and since the time in which to take the appeal from the summary decree of June 18, 1946 is past, it cannot be considered upon an appeal from the supplemental decree entered September 24, 1946. (Rabe v. Rabe, 366 Ill. 600.)

Defendants argue that the petition upon which the supplemental decree is predicated is in effect "a petition for the discovery of assets, commonly known as citation proceedings," and that it fails to comply with section 73(2) of the Civil Practice Act and Rule 26(a) of the Supreme Court of Illinois. Defendants' position is untenable.

The primary purpose of the supplemental proceedings was to reach the interests of the principal defendants in the trust. In equity an attorney's lien extends into whosoever hands such proceeds may come in the settlement. (Catherwood v. Morris, 360 Ill. 473.) The provision in the supplemental decree directing a master in chancery to sell the interest of Nat F. Grusin in the trust was an incidental matter expressly reserved for consideration in the decree of June 18, 1946 and therefore proper in order to enforce the plaintiffs' liens. (Rettig v. Zander, 364 Ill. 112; Eich v. Czervenko, 330 Ill. 455.)

For the reasons given, plaintiffs' motion to dismiss the appeal as to the orders of June 7, 1946 allowing plaintiffs to file their motion and affidavit for summary decree and overruling the defendants' motion to dismiss the complaint, the order of default of June 18, 1946, and the decree of June 18, 1946,



George W. Foster State Bank, 206 Ill. 2d.

The time limitation in Section 28 of the Civil

Code, which provides that an appeal shall be presented within

ninety days from the date of the entry, judgment and decree,

compliance with, is a statute of limitation. Boyd v. Boyd, 206 Ill.

v. 206, 207 Ill. 2d, 210, and since the law in effect at that

the appeal from the summary decree of June 12, 1945 is valid,

it cannot be considered as a bar to the appeal.

Summary entered September 12, 1945. (Boyd v. Boyd, 206 Ill. 2d, 207.

Thereafter, the law in effect at that time was such that

summary entered was in violation of the law in effect at that time.

The discovery of error, summary entered in violation of the law,

and that it shall be treated as a nullity from the date of its

entry and the date of the summary decree of June 12, 1945.

Thereafter, the law in effect at that time was such that

the summary entered of the summary decree was

to reach the summary decree of the summary decree in the year.

It is held that the summary decree of the summary decree was

entered as a nullity. (Boyd v. Boyd, 206 Ill. 2d, 207.

206 Ill. 2d, 207. The summary decree of the summary decree was

entered as a nullity as well as the summary decree of the summary

decree was an invalid entry and is treated as a nullity.

It is held that the summary decree of the summary decree was

entered as a nullity. (Boyd v. Boyd, 206 Ill. 2d, 207.

206 Ill. 2d, 207. The summary decree of the summary decree was

entered as a nullity. (Boyd v. Boyd, 206 Ill. 2d, 207.

The appeal as to the summary decree of the summary decree was

to the summary decree and affidavit for summary decree and over-

turning the summary decree of the summary decree was nullity, the order

of summary of June 12, 1945, and the summary decree of June 12, 1945,

is allowed, and the appeal is accordingly dismissed as to the foregoing orders and decree. The order of August 8, 1946, for the issuance of execution and for discovery; the order of September 18, 1946, denying the defendants' motion to vacate the decree of June 18, 1946; and the supplemental decree of sale of September 24, 1946, are affirmed.

DECREE AND SUPPLEMENTAL  
DECREE AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

is allowed, and the appeal is accordingly dismissed as to the foregoing orders and decrees. The order of August 2, 1943, for the issuance of execution and for discovery; the order of September 13, 1943, denying the defendants' motion to vacate the decree of June 18, 1942; and the supplemental decree of June 18, 1942, are affirmed.

RECORDED AND INDEXED  
FEBRUARY 1944

KILEY AND WORTH, JR. REPORT.

44039

JOSEPH POMPROWITZ,

Appellee,

v.

LaSALLE - RANDOLPH GARAGE CORP.,  
a corporation,

Appellant.

APPEAL FROM

MUNICIPAL COURT

COOK COUNTY.

3381A.329

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

By this appeal defendant seeks to reverse an ex parte judgment for \$339.30 alleged to have been paid by plaintiff for necessary repairs to his automobile which was damaged while parked in defendant's garage. On May 28th, 1946 plaintiff filed a statement of claim alleging in substance that on or about December 20, 1945, he delivered his Cadillac automobile to defendant's public garage to be safely kept and stored by defendant for a consideration; that on or about December 21, 1945 defendant delivered plaintiff's automobile to him in a broken or damaged condition and that plaintiff was required to and did expend the sum of \$339.30 to make necessary repairs as a result of such damage.

On June 17, 1946 defendant filed an answer admitting that it operated a public garage and denying the other allegations of the statement of claim.

Upon issue being joined the cause was set for trial on September 6, 1946. Defendant failed to appear on that day and an ex parte judgment was rendered against defendant in the sum of \$400 and costs. On November 12, 1946 defendant filed a written motion in the nature of a writ of error coram nobis (Civ. Prac. Act, Sec. 72) alleging that the statement of claim failed to state a cause of action and that the judgment was at variance with the pleadings. On November 13, 1946 the court overruled defendant's motion and on motion of plaintiff entered an order reducing the

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judgment entered September 6, 1946 from \$400 to \$339.30, the former sum being the ad damnum and the latter the sum actually paid for repairs as set forth in the statement of claim. On November 19, 1946 defendant filed another written motion in the nature of a writ of error coram nobis to vacate the judgment as amended on November 13, 1946 and for a new trial, alleging the same grounds as in the prior motion, and in addition thereto that the order reducing the judgment from \$400 to \$339.30 amounted to a change in substance after term time. Afterward, on November 22, 1946, defendant's second motion to vacate the amended judgment and for a new trial was overruled.

Defendant contends that in order to set forth a good cause of action plaintiff's statement of claim must allege that the automobile was in good condition at the time of delivery to the bailee.

Section 42 of the Civil Practice Act provides that no pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim, and that all defects in pleadings, either in form or substance, not objected to in the trial court, shall be deemed to be waived. The record shows that defendant did not question the sufficiency of the statement of claim by a motion to strike. We think that the statement of claim reasonably informed defendant of the nature of plaintiff's claim and that from the allegations of the statement of claim it can be implied that plaintiff's automobile was in good condition when he left it at defendant's garage and that it was damaged while stored there.

Defendant's motions filed November 12th and 19th, 1946 do not allege any legal grounds excusing defendant's failure to appear on September 6, 1946 when the cause was set for trial.





(Carroll, Schendorf & Boenloke, Inc. v. Hastings, 269 Ill. App. 564; Leafgreen v. Bornstein, 174 Ill. App. 36.) Nor can defendant by its written motions under Section 72 of the Civil Practice Act be relieved from the consequence of its own negligence in failing to appear on the day the cause was set for trial. (McCord v. Briggs & Turivas, 338 Ill. 158.) Moreover, error coram nobis does not lie to contradict or put in issue any fact that has been adjudicated in the action or to correct any error in the judgment of the court. (Chapman v. North American Ins. Co., 292 Ill. 179, 189.)

Defendant maintains that the trial court erred in amending the judgment after the term had elapsed. The judgment entered on September 6, 1946 was the same as the ad damnum, whereas the amended judgment was for \$339.30 which was the sum plaintiff alleged as spent for necessary repairs. Obviously the judgment for \$400 was a clerical error, since the plaintiff's claim was only for moneys actually expended. Reduction of the judgment under these circumstances is not a substantial change nor is defendant prejudiced thereby. The court merely amended its own record to speak the truth. (Mazor, et al., v. Handler, 208 Ill. App. 312.)

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.



43459

GEORGIANA G. HESS, Individually and  
as Administratrix with the Will  
Annexed of the Estate of Georgiana  
L. Gilbert, Deceased,

Plaintiff - Appellant,

v.

HELEN S. GILBERT, VICTORIA C. NELSON  
and H. A. NELSON,

Defendants - Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

332 I.A. 3301

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Georgiana G. Hess and Helen S. Gilbert, sisters, are the sole heirs and next of kin of Georgiana L. Gilbert and Hiram T. Gilbert. Georgiana, one of the daughters, is divorced, and the other, Helen, is a spinster. On September 21, 1899 the mother became the owner of the real estate commonly known as 5234 Woodlawn Avenue, Chicago, improved with a three story frame 14 room house. On August 24, 1917 the mother, by her last will and testament, devised the real estate to her two daughters in equal shares. The mother died on January 11, 1935. The will was filed in the clerk's office of the Probate Court on June 25, 1935 and was admitted to probate on July 22, 1940, at which time Georgiana, one of the daughters, was appointed and duly qualified as administratrix with the will annexed of the estate of Georgiana L. Gilbert, deceased. From the time the mother acquired the real estate until her death, the residence was occupied by the family consisting of the mother, father and two daughters. The father remarried on June 1, 1935 and moved from the premises. He died on November 29, 1939.

On July 31, 1940 Georgiana G. Hess, individually and as administratrix of the estate of her mother, filed a complaint in chancery in the Superior Court of Cook County against Helen

George A. Smith, individually and  
as administrator with will annexed  
of the estate of George  
L. Albert, deceased.

Plaintiff - Defendant.

Wm. A. Albert, Defendant.  
and  
Geo. A. Smith, Plaintiff.

Defendants - Plaintiffs.

THE JUDGE OF THE COURT OF THE COUNTY OF THE STATE OF

George A. Smith and Geo. A. Albert, Defendants, and

The said wife and heirs of Geo. A. Albert and

Wm. A. Albert, Defendants, vs. Geo. A. Smith, Plaintiff,  
and the other, claim, is a will, to wit: Geo. A. Smith, Plaintiff, and the

other parties and heirs of Geo. A. Smith, Defendants, and

Geo. A. Smith, Plaintiff, and the other parties and heirs of Geo. A. Smith, Defendants, and

Geo. A. Smith, Plaintiff, and the other parties and heirs of Geo. A. Smith, Defendants, and

Geo. A. Smith, Plaintiff, and the other parties and heirs of Geo. A. Smith, Defendants, and

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Geo. A. Smith, Plaintiff, and the other parties and heirs of Geo. A. Smith, Defendants, and

Geo. A. Smith, Plaintiff, and the other parties and heirs of Geo. A. Smith, Defendants, and



S. Gilbert, Victoria C. Nelson and H. A. Nelson. Therein plaintiff alleged that the defendants fraudulently conspired to deprive her of the use, benefit and rents of the premises by falsely pretending that Helen S. Gilbert was the owner in fee simple of the premises by virtue of a warranty deed from their parents to her, Helen, dated November 7, 1934 and recorded January 11, 1935; that the warranty deed was not delivered to the grantee during the lifetime of her mother; that it was void and ineffective to convey title; that Helen and the Nelsons entered into an agreement whereby the Nelsons were permitted to enjoy the use of the premises without payment of rent; that Victoria C. Nelson, one of the defendants, in collusion with Helen, brought a forcible detainer suit in the Municipal Court of Chicago, which resulted in a judgment finding the plaintiff herein, Georgiana G. Hess, guilty of withholding the premises from Mrs. Nelson; that because of such judgment plaintiff herein was obliged to and did vacate the premises; and that defendants occupied the premises to the exclusion of plaintiff. The complaint further alleged that a pretended declaration of trust by Helen S. Gilbert dated November 7, 1934, was recorded on December 16, 1935. The declaration of trust, a copy of which is attached to the complaint, acknowledges that Helen S. Gilbert will hold title to the premises in trust for herself and her sister, Georgiana, for the purpose of "converting same into money", retaining for herself one half of the proceeds and paying over the remaining one half to her sister, such remaining one half to be paid "only into her own hand for her own sole support and maintenance, and not to be assignable by her or subject to any liabilities which she may contract." Plaintiff prayed that a decree be entered finding that defendants wrongfully obtained and kept possession of the premises; that defendants be required to account to plaintiff for the reasonable value of the rents from November, 1935; that the warranty deed dated November 7, 1934 be found void and



E. Albert, Victoria E. Nelson and W. A. Nelson. The said plaintiff

alleged that the defendant fraudulently converted in Georgia

her of the use, benefit and rent of the premises by falsely

pretending that Helen E. Albert was the owner of the premises

the premises by virtue of a warranty deed from Helen E. Albert

her, Helen, dated November 7, 1934 and recorded January 11, 1935;

that the warranty deed was not delivered to the proper parties

the lifetime of her mother; that it was void and inoperative

convey title; that Helen and the defendant agreed to an agreement

whereby the Nelsons were entitled to enjoy the use of the premises

without payment of rent; that Victoria E. Nelson, one of the

defendants, in collusion with Helen, procured a Georgia judgment

suit in the Municipal Court of Chicago, which resulted in a judgment

finding the plaintiff honest, defendant E. Albert guilty of will-

fully holding the premises from Mrs. Nelson; that because of such judgment

plaintiff herein was obliged to end his search for the premises; and

that defendants occupied the premises to the prejudice of plaintiff;

The complaint further alleged that a proposed judgment of title

by Helen E. Albert dated November 7, 1934, was recorded on

December 10, 1935. The restriction of title, a copy of which is

attached to the complaint, acknowledges that Helen E. Albert will

hold title to the premises in trust for herself and her sister,

Georgia, for the purpose of "conveying same into Georgia,"

retaining for herself one half of the premises and paying over the

remaining one half to her sister, such remaining one half to be

paid "only into her own hand for her own sole support and maintenance

and not to be assignable by her or subject to any lien or

which she may contract." Plaintiff prays that a decree be entered

finding that defendants wrongfully obtained and have possession

of the premises; that defendants be required to account in plain-

tiff for the reasonable value of the rents from November, 1935;

that the warranty deed dated November 7, 1934 be found void and

ineffective to convey title to Helen; and that the declaration of trust be declared void and ineffective to create a trust.

Answering, the defendants admitted the making of the will by the mother and its admission to probate, the appointment of plaintiff as administratrix with the will annexed of the estate of the mother; asserted that the deed was delivered to Helen during the lifetime of the mother; that the parents regarded plaintiff, Georgiana, as a spendthrift; that the relations between plaintiff and Helen were "somewhat strained"; that as a solution the parents conceived the plan of deeding the real estate to Helen and having her execute a declaration of trust, the purpose being to protect the one half interest therein of plaintiff; that in furtherance of the plan the deed and declaration of trust were executed; and that Helen at all times acted in good faith in endeavoring to carry out the intention of their parents so expressed. In a counterclaim Helen S. Gilbert alleged that she cannot determine "precisely what her duties are with respect to the sale or other disposition" of the real estate. Therein she prayed for a construction of the declaration of trust; that the court decree a sale of the real estate; that out of the proceeds of the sale she be allowed the sum of \$653.77, the difference between the amounts spent by her for the preservation of the property and the amount received by her as rents during the trusteeship; that she be allowed to pay her reasonable attorney's fees, court costs, commissions and expenses; and that the net balance be divided between her sister and herself.

The court entered a decree finding that the two sisters are the sole surviving heirs at law and next of kin of their parents, both deceased; that in and by the last will and testament of the mother and upon the death of the mother the two daughters, Georgiana G. Hess and Helen S. Gilbert, became tenants in common

ineffective to convey title to Helen; and that the declaration of trust be declared void and ineffective to create a trust.

Accordingly, the defendant admitted the validity of the

will by the mother and the admission to produce, the appointment of plaintiff as administratrix with the will annexed of the estate

of the mother; admitted that and based on admitted to Helen

during the lifetime of the mother; that the parties intended plaintiff, defendant, as a co-administratrix; that the relations between

plaintiff and Helen were "married relations"; that as a relation

the parties conceived the idea of dividing the real estate of

Helen and having her execute a declaration of trust, the parties being to protect the one half interest therein of plaintiff; that

in furtherance of the plan the declaration of trust

was executed; and that Helen at all times acted in good faith in endeavoring to carry out the intention of their parents as expressed.

In a counterclaim Helen . . . plaintiff alleged that the same defendant

"precisely what was done and with intent to take title to Helen's disposition" of the real estate. Therein she prayed for a re-

traction of the declaration of trust; that the court should set aside the real estate; that two of the proceeds of the sale and

be allowed the sum of \$100.00; the difference between the amounts spent by her for the preservation of the property and the amount

received by her as rents during the trust; that she be

allowed to pay her reasonable attorney's fees, court costs,

commissions and expenses; and that the net balance be divided between her sister and herself.

The court entered a decree finding that the two sisters are the sole surviving heirs at law and next of kin to their

parents, both deceased; that in and by the last will and testament of the mother and upon the death of the mother the two daughters,

Josephine B. Hale and Helen B. Miller, common parents in common

of the real estate, subject only to the rights of their father, Hiram T. Gilbert, during his lifetime; that upon the death of the father, title to the real estate vested solely in the daughters as tenants in common, each being entitled to an undivided one half interest therein; that the warranty deed dated November 7, 1934 and recorded January 11, 1935 was not delivered; that the father ceased to live in the premises on or about June 1, 1935; that during the period from October 1, 1935 to July 1, 1941 the defendant, Helen, held and managed the premises "under the bona fide belief" that she had a right so to do under the deed and declaration of trust; that Helen entered into six agreements in the nature of leases with the Nelsons for the period from October 1, 1935 to October 1, 1940; that the Nelsons continued in possession until the Spring of 1941; that they paid rent at the rate of \$25 per month for a period of 60 months, or a total of \$1,500, which sum was a fair and reasonable rental for the portion of the premises rented to them; that for the balance of the period allowances were made to the Nelsons for decorating and repair work done by them in lieu of rent; that during the period from October 1, 1935 to July 1, 1941 Helen had possession of rooms in the premises; that a fair and reasonable rental should be charged to her, Helen, for such occupancy, which the court found to be \$25 per month, or a total for the period of 69 months of \$1,725; that during the period ending on or about July 1, 1941 Helen was obliged to and did expend \$2,153.77 in the premises; that the account filed therein is a true and correct account of her receipts and expenditures; that plaintiff took possession of the premises on October 1, 1941; that she has been in continuous possession since then; that prior to and since July 1, 1941 plaintiff was advised by Helen that she, Helen, did not join in the making of further repairs or improvements to the building;



of the real estate, subject only to the rights of tenant, William T. Gilbert, during his lifetime; that upon the death of the father, title to the real estate vested solely in the daughter, as tenant in common, said being entitled to an undivided one-half interest therein; that the warranty deed dated November 7, 1924 and recorded January 12, 1925 was not delivered; that the father ceased to live in the premises on or about June 1, 1925; that during the period from October 1, 1925 to July 1, 1926 the father, Helen, held and managed the premises "as though she were sole owner"; that she had a right to do so under the deed and declaration of trust; that Helen entered into six agreements in the nature of leases with the Nelsons for the period from October 1, 1925 to October 1, 1926; that the Nelsons continued in possession until the spring of 1927; that they paid rent at the rate of \$25 per month for a period of 60 months, or a total of \$1,500, which was a full and reasonable rental for the portion of the premises rented to them; that for the balance of the period aforesaid were made in the Nelsons for decorating and repair work done by them in lieu of rent; that during the period from October 1, 1925 to July 1, 1926 Helen had possession of room in the premises; that a fair and reasonable rental should be charged to her, Helen, for such occupancy, which the court found to be \$25 per month, or a total for the period of 60 months of \$1,500; that during the period ending on or about July 1, 1927 Helen was obliged to and did expend \$1,128.77 in the premises; that the amount said therein is a true and correct account of her receipts and expenditures; that plaintiff took possession of the premises on October 1, 1927; that she has been in continuous possession since then; that prior to and since July 1, 1927 plaintiff was advised by Helen that she, Helen, did not join in the making of further rental or improvements to the building;

that any repairs or improvements made by plaintiff from July 1, 1941 were made without the consent of Helen and over her objection; that no order of court was entered authorizing any expenditures; and that in order to safeguard the building from serious damage it became necessary for plaintiff to install five new concrete posts at a cost of \$46, to replace certain broken panes of glass and to install window ropes, the reasonable cost of which was \$24.50. The court further found that except for the items of \$46 and \$24.50, plaintiff is not entitled to credit for any further expenditures made by her; that no fraud was committed by Helen or by anyone acting for her; that Helen should account for \$3,225; that she should be credited with \$2,153.77, leaving a balance of \$1,071.23; that the share of each sister therein is \$535.61; and that Georgiana is entitled to credit for one half of the expenditures of \$70.50 necessarily made by her, or \$35.25 the other one half being chargeable to Helen. The court finds that it is to the best interest of the sisters that the premises be sold as in a partition suit under the supervision of the court, and that the net proceeds be distributed between them. Thereupon the court decreed that the warranty deed dated November 7, 1934, executed by the parents to Helen, be null and void and removed as a cloud upon the premises; that each of the parties bear that portion of the stenographic expenses incurred in taking and transcribing the testimony; that there is due defendant from the plaintiff the sum of \$141.65, being one half of the sum theretofore paid by defendant to the special commissioner; that plaintiff recover from defendant \$429.22, being the difference between \$535.62 and \$35.25 due Georgiana on account of the necessary repairs made on the premises, and the sum of \$141.65 due Helen on account of the special commissioner's fees; that Georgiana have execution for the \$429.22; and that the real estate be partitioned. The commissioners appointed by the decree



[illegible]

reported that the premises were not susceptible of division without manifest prejudice to the parties in interest and they appraised the value of the premises at \$4,500. The court thereupon decreed that the premises be sold at public auction to the highest and best bidder.

Georgiana, individually and as administratrix with the will annexed of Georgiana L. Gilbert, deceased, appeals from the final decree. Helen S. Gilbert filed a notice of cross-appeal. The theory of plaintiff is that defendant did not fully account to her for the use of the premises during the period in which she and the Nelsons were in sole possession; that defendant did not substantiate any expenditures made during this period, except two tax receipts and one insurance receipt; that plaintiff is entitled to recover her one half of the rental value of the premises at the rate of \$65 a month for a period of five years; that she is entitled to recover her expenditures to keep the premises in safe and habitable condition for the period subsequent to July 1, 1941; and that defendant should be required to pay the master's fees and costs. Defendant's theory is that she fully accounted to plaintiff for the use and occupation of the premises; that the court properly denied plaintiff the right to recover for certain expenditures made by her (plaintiff) after she entered into the premises in July, 1941; that the court erred in charging the account of defendant with the amount of \$25 per month for the period of 69 months from September 1, 1935; that plaintiff's action is barred by laches; and that although almost all of plaintiff's case was taken up with the attempt to prove her right to recover the cost of repairs and improvements made by her after the suit was filed, this issue is not covered by the pleadings in the case. The parties are not contesting that part of the decree declaring the warranty deed of November 7, 1934 to be

reported that the husband was not susceptible of giving witness manifest prejudice to the parties in interest and they complained the value of the property is \$4,000. The court therefore found that the proceeds be void as public money to the extent of the best bidder.

Georgina, individually and in partnership with her will annexed of Georgina M. Willett, deceased, appellee from the final decree. John M. Willett filed a motion to set aside the decree. The theory of plaintiff is that defendant is not fully answerable to her for the use of the proceeds during the period in which she and the husband were in sole possession; that defendant did not substantiate any expenditures made during this period, except two tax receipts and one insurance receipt; that plaintiff is entitled to recover her one half of the rental value of the premises at the rate of \$65 a month for a period of five years; that she is entitled to recover her expenditures to keep the premises in repair and suitable condition for the period subsequent to July 1, 1934; and that defendant should be required to pay the balance of the costs. Defendant's theory is that she fully answered to plaintiff for the use and occupation of the premises; that her court remedy denied plaintiff the right to recover for expenditures made by her (plaintiff) after the balance of the proceeds is paid, 1934; that the court erred in charging the account of defendant with the amount of \$65 per month for the period of five years (from December 1, 1934; that plaintiff's motion is denied by law; and that defendant almost all of plaintiff's case was taken up with the attempt to prove her right to recover the cost of repairs and improvements made by her after the suit was filed, this issue is not covered by the pleadings in the case. The parties are not contesting that part of the decree declaring the warranty deed of November 2, 1934 to be

null and void, or that part of the decree finding that the title to the real estate is vested solely in Georgiana G. Hess and Helen S. Gilbert as tenants in common, each being entitled to an undivided one half interest therein, or that part of the decree directing a partition of the real estate, or that part of the subsequent decree directing a sale of the real estate. The decree does not make any finding as to the declaration of trust executed by Helen S. Gilbert on November 7, 1934. As this instrument is founded on the assumption of a valid warranty deed and as the court has decreed (and the parties concede), that the warranty deed is null and void, it follows that the declaration of trust is also void. It has nothing on which to rest.

For a period of seven months the Nelsons did not pay any rent and for the balance of the time \$25 per month, with defendant Helen S. Gilbert contributing \$25 per month to the Nelsons for such part of the premises as she, defendant, occupied, and in addition defendant was contributing to the heating of the house. Plaintiff maintains that the preponderance of the evidence established that the fair rental value of the premises was \$65 per month, the tenant to furnish the heat; that defendant made no investigation to determine what she could procure as income on a rental basis; that she arbitrarily took "her dear friends" into the house; that she allowed the Nelsons by forcible detainer proceedings to evict plaintiff from the premises; that plaintiff and defendant had equal rights to possession; that defendant does not endeavor to sustain or justify the rental of \$25 per month; that there is no competent evidence as to any repairs by defendant or under her direction; that there is no competent evidence as to payment of taxes by defendant; that defendant could not, on cross examination, identify one check or item of expense for which she is given credit; that all her testimony was "merely hearsay"; that defendant claims credit for \$1,611.43 for payment of general taxes, yet produced only two receipts aggregating \$397.06; that defendant had neither checks or vouchers to prove any other payments; that





defendant's "Exhibit 18", a statement of account by her, is a "manufactured computation" not supported by any evidence and not admissible; that plaintiff, after the Nelsons left the premises, took possession and she had to make repairs; that she (plaintiff) repaired the furnace, bought a new hot water heater; bought coke to heat the house; that she plastered several rooms and hallways; that defendant occupied an apartment in the premises; that the apartment was heated at the expense of plaintiff; and that defendant owes to plaintiff one half of the expenditures by plaintiff of \$461.17. Plaintiff maintains that defendant should be charged with 69 months rent at \$65 per month, or \$4,485; that defendant should be credited with taxes paid by her in the sum of \$397.06 and insurance premiums in the sum of \$16.34, totaling \$413.40, leaving a balance of \$4,071.60, of which one half is due to plaintiff, or \$2,035.80; that plaintiff should also be credited with \$922.34, which she necessarily expended in maintaining the property after the Nelsons moved out, one half of which should be charged to defendant; that, in addition, defendant should pay the expense of taking and transcribing her testimony in the sum of \$216 and the master's fees of \$283.30; and that the net amount due from defendant to plaintiff is \$2,996.27.

Plaintiff relies on the provisions of Sec. 5, ch. 76,

Ill. Rev. Stat. 1947, reading:

"When one or more joint tenants, tenants in common or co-partners in real estate, or any interest therein, shall take and use the profits or benefits thereof, in greater proportion than his or their interest, such person or persons, his or their executors and administrators, shall account therefor to his or their co-tenants jointly or severally."

See the following cases construing this section: Sharp v. Sharp, 328 Ill. 564; 160 N. E. 140; Cheeney v. Ricks, 187 Ill. 171; 58 N. E. 234; Woolley v. Schrader, et al., 116 Ill. 29; Cooper v. Martin, 308 Ill. 224; Wolkau v. Wolkau, 299 Ill. 176. Defendant does not



defendant's "Exhibit 10", a statement of account by her, is a "manifested computation" not supported by any evidence and not admissible; that plaintiff, after the Nelsons left the premises, took possession and she had to take various; that she (plaintiff) repaired the furnace, bought a new hot water heater; bought other to heat the house; that she plastered several rooms and ceilings; that defendant occupied an apartment in the premises; that the apartment was heated at the expense of plaintiff; and that defendant owes to plaintiff one half of the expenditures by plaintiff of \$471.17. Plaintiff maintains that defendant should be charged with 60 months rent at \$5 per month, or \$3,000; that defendant should be credited with taxes paid by her in the sum of \$27.94 and insurance premiums in the sum of \$12.50, totaling \$15.44, leaving a balance of \$3,000.00, of which one half is due to plaintiff, or \$1,500.00; that plaintiff should also be credited with \$200.00 which she necessarily expended in maintaining the property after the Nelsons moved out, one half of which should be charged to defendant; that, in addition, defendant should pay the amount of taking and transcribing her testimony in the sum of \$100 and the master's fees of \$251.25; and that she has earned the room defendant to plaintiff is \$2,000.00.

Plaintiff relied on the provision of Sec. 5, Ch. 10, Ill. Rev. Stat. 1947, reading:

"When one or more joint tenants, tenants in common or co-owners in real estate, or any interest therein, shall take and use the profits or benefits thereof, in private, confidential, or otherwise, such person or persons, his or their executors and administrators, shall account therefor to his or their co-tenants jointly or severally."

See the following cases construing this section: Shack v. Shack, 325 Ill. 544; 160 N. W. 140; Chapman v. Chapman, 327 Ill. 171; 168 N. W. 24; Kelly v. Kohnen, 328 Ill. 118; 116 Ill. 28; Good v. Kelly, 328 Ill. 118; 116 Ill. 178. Defendant does not

dispute the proposition of law advanced by plaintiff. She stated that she rendered a complete, true and just account and that she fulfilled her obligation to plaintiff. She received and accounted for \$25 per month. The chancellor surcharged her, over her protest, with an additional \$25 per month for 69 months, or \$1,725. We agree with the finding that defendant managed the premises under the bona fide belief that she was the legal owner of the premises in question and that she had the right to act as trustee under her declaration of trust. It will be recalled that the period of her occupancy was during the depression. The house was in bad physical condition. In 1935 there were many like houses for rent in the vicinity. The house was badly located to rent to roomers. The parents of the parties had stopped paying taxes or repairing the place. Defendant listed the property with real estate firms in the neighborhood. She is a high school teacher and spoke of the rental to those about her at the Hyde Park High School. At their request she went to see the Nelson family as prospective tenants. They were "not very dear friends" as plaintiff maintains. Upon investigation she found them to be a worthy family. In the meantime plaintiff had advertised the place in a daily newspaper. Some people came and went through the house but did not rent or buy it. The Nelsons came to the house at defendant's request, where they met plaintiff. At first a caretaker proposition was discussed. Then the lease was discussed. The question of the probable high cost of heating came up and defendant promised that if they would come in, she would help them with the coal out of her own pocket. A lease was finally signed by defendant with them for the period from December 1, 1935 to May 31, 1937 at a rental of \$25 per month. The Nelsons were allowed five months rent as consideration for making repairs and putting the house in a livable condition. Defendant testified that plaintiff approved the rental of \$25 per month.

dispute the proposition of the defendant. The parties  
 that the defendant's conduct, from the time that the  
 plaintiff was notified of the defendant's conduct, was  
 for the defendant. The defendant's conduct was, from the time  
 with an additional five months for the defendant, to the  
 agree with the finding that defendant's conduct was  
 the defendant's conduct and the defendant's conduct was  
 in question and that the defendant's conduct was  
 declaration of law. It will be recalled that the court of  
 her competency was during the defendant's conduct. The court was in the  
 physical condition. In 1938 there were many like houses for rent  
 in the vicinity. The house was being located to rent in 1938.  
 The purpose of the parties was to avoid paying taxes on building  
 the house. Defendant lived the property with real estate from  
 in the neighborhood. As to a high school teacher was known to  
 the rental to these times was at the time this high school, in  
 their regard the rent to be the defendant's conduct in the  
 tenants. They were not very well known, as defendant's conduct  
 upon investigation the court was to be a finding in the  
 defendant's conduct and defendant's conduct was a daily occurrence.  
 Some people came and went from the house and the rent was to be  
 it. The defendant came to the house as defendant's conduct, and  
 they are plaintiff. At first a certain proposition was discussed.  
 Then the issue was discussed. The question of the defendant's  
 cost of building came up and defendant's conduct was that it was  
 come in, and would help them with the rent out of their own pocket.  
 A lease was finally signed by defendant with them for the period  
 from December 1, 1938 to May 31, 1939 at a rental of \$25 per month.  
 The Helms were allowed five months' rent as consideration for  
 selling repairs and putting the house in a livable condition. Defendant  
 testified that plaintiff approved the rental of the property.

This conversation was not denied by plaintiff. The record does not disclose what made it necessary for the Nelsons to bring the eviction proceedings. Defendant having rented the premises did not find it easy to keep her tenants. The cost of the coal was high and defendant helped the tenants with it. She stored her goods there rather than elsewhere and paid the Nelsons \$25 per month for the rooms occupied. In this way she kept the premises occupied for the five "bad years." The net result was that through defendant's payments to the Nelsons she gave free rent for a caretaker.

The master found that the rental of \$25 per month for the 60 months was a fair and reasonable rental for the portion of the premises occupied by the Nelsons. We are satisfied that this finding is supported by the evidence. The allowance made to the Nelsons for the decorating and repair work they did on the premises in lieu of rent for the balance of the period was reasonable, and the finding in that regard should not be disturbed.

Turning to the objection of plaintiff to the allowance of the items in the account of defendant shown in Exhibit 18 totaling \$2,153.77, it will be observed that the truth of all "charged items" in this exhibit totaling \$2,060.18 was checked, verified and admitted as correct by counsel for plaintiff. The remaining items of \$93.59 called "cash items" were proved and supported by original bills rendered to and paid by defendant and put in the record as Exhibits 19 to 55. As to defendant's credit for the payment of taxes for 1933, 1935, 1936, 1938 and 1939 totaling \$1,611.43 shown in defendant's Exhibit 18, these were also checked and admitted by counsel for plaintiff as having been paid. The record also shows the repairs made by the Nelsons. It is clear that the master and chancellor properly allowed the expenditures of \$2,153.77 made by defendant, as shown in her Exhibit 18.



This investigation was not denied by defendant. The reason for this disclosure was that it was necessary for the witness to believe the evidence presented. Defendant having denied the expenses did not think it easy to keep her remarks. The cost of the coat was high and defendant helped the witness with it. The witness had found that rather than elsewhere and had the witness the new money for the money concealed. In this way she said the witness received for the five "Red years". The new money was that money from the witness's payments to the witness she gave her for a dress.

The matter about the receipt of the witness for the 50 months was a lie and defendant denied the witness of the premises occupied by the witness. The witness said that the witness is suggested by the evidence. The evidence made in the witness for the accounting and receipts were that the witness was in the of rent for the balance of the witness and the witness, and the witness in that regard should not be disturbed.

Turning to the suggestion of defendant in the witness of the items in the account of defendant shown in Exhibit 18 is correct. It will be observed that the witness did not have the witness in this exhibit totaling \$2,000.00 was observed, received and the witness as correct by general for defendant. The witness was of \$2,100.00 defined "with items" were covered and suggested by defendant. The witness to have said to defendant and not in the second as witness in to \$2. As to defendant's receipt for the witness of \$2,100.00, 1935, 1936, 1937, 1938 and 1939 totaling \$2,100.00 shown in defendant's Exhibit 18, there were also enclosed and admitted by defendant for the witness as having been paid. The witness also shows the receipt for the witness. It is often that the witness and defendant's receipt for the expenditures of \$2,100.00 made by defendant, as shown in her Exhibit 18.

Defendant urges that the plaintiff is not entitled to an allowance of any sum as recompense for repairs to the premises. There were no pleadings on this subject. At the hearing plaintiff began proving up items of repair made by her after July, 1941 and defendant objected. Plaintiff made no accounting of her occupancy, nor did defendant ask or demand one. Though this case was pending in the Superior Court, no order was sought or obtained for leave to make repairs. No evidence was presented showing any increase in the value of the premises by reason of the repairs. See Heppe v. Szczepanski, 209 Ill. 88, 107. We agree that the position of defendant as concerns the repairs made by her during the years 1935 to 1941, credit for which is given in her account, is entirely different. She received rentals from the premises and rightfully charged against such rentals the sums expended to put and maintain the premises in a livable condition. We cannot agree with defendant that the chancellor erred in allowing plaintiff the sum of \$46 for replacing the posts in the basement and the further sum of \$24.50 for repairing the windows. These were necessary expenditures in order to conserve the property.

Defendant insists that the court erred in surcharging her \$25 per month for 69 months from October 1, 1935 to July 1, 1941, and that the account between the parties should be corrected by omitting therefrom the sum of \$1,725 so surcharged against her, and by further omitting the sum of \$70.50 allowed to plaintiff for replacing the posts and repairing the windows. We cannot agree with defendant. We are of the opinion that the chancellor properly balanced the equities and made a just decision. Plaintiff asserts that she should not be charged with any part of the fees of the master. The payment of costs in a chancery case is largely within the discretion of the chancellor. The chancellor has a right to apportion costs on an equitable basis. Approximately 400 of the



statement made that the plaintiff is not entitled to an  
 allowance of any sum as compensation for vacancy in the position.  
 There were no findings on this subject. In the second paragraph  
 there is a finding that the plaintiff was not entitled to any  
 and defendant objected. Plaintiff made no submission of law  
 or equity, nor did defendant ask for a demand for. From this case  
 was heard in the second term, no order was made. In the third  
 for leave to make a motion. At the time the plaintiff applied for  
 judgment in the year of the plaintiff's death in the year  
 the case v. [unclear], 200 II. 25, 107. The case was then  
 position of defendant as executor and trustee was not during  
 the year 1920 to 1921, thereby the estate is liable in the amount  
 is entirely different. The plaintiff's estate was not liable and  
 plaintiff's estate cannot recover from the estate of the  
 and estate in the estate is a trustee. The estate is  
 with defendant that the plaintiff was in the estate of the  
 and of the estate, the estate is the plaintiff and the estate  
 and of the estate for the plaintiff and the estate. The estate  
 is liable in the estate for the plaintiff and the estate.  
 Defendant insists that the estate is liable in the estate  
 but the estate can be made from the estate, 1920 to 1921,  
 1921, and that the estate is liable in the estate in the estate  
 by setting aside the estate and the estate is liable in the estate  
 and by further setting the estate of 1920.60 allowed to plaintiff for  
 repaying the money and restoring the estate. The estate is  
 with defendant. The estate of the estate and the estate is  
 allowed the estate and estate is just decision. Plaintiff insists  
 that the estate should not be charged with any part of the loss of the  
 estate. The estate of the estate is a trustee and is liable in the  
 the decision of the estate. The estate has a right to  
 repaying the estate on an estate basis. Approximately 100 of the

600 pages of testimony before the master concerns matters relating to plaintiff's occupancy of the premises after 1941, repairs made by her during that period and her attempts to compel defendant to contribute to the repairs and upkeep after that date. She failed to maintain her position. We find that the apportionment of the charges and costs made by the chancellor is fair. For these reasons the decrees of the Superior Court of Cook County are affirmed.

DECREES AFFIRMED.

KILEY, J. CONCURS.

LEWE, P.J. TOOK NO PART.



44085

GEORGE W. WYMA, a minor by his  
mother and next friend, ANNA WYMA,

Appellee,

v.

DE FAY WONDER CLEANERS, INC., a  
corporation,

Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

3381A.880<sup>2</sup>

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In a complaint filed in the Circuit Court of Cook County by George W. Wyma, a minor, against De Fay Wonder Cleaners, Inc., plaintiff alleges that on January 25, 1945 defendant was operating his motor truck in a northerly direction in a certain alley at or near the intersection of the alley with 59th Street in Chicago; that plaintiff, a minor, was a pedestrian crossing the alley at its intersection with 59th Street; that he was using all due care and caution for his own safety; and that the defendant so negligently and carelessly operated his motor truck that as a proximate result thereof the truck was caused to run into, upon and against plaintiff, whereby he sustained injuries. The complaint alleged negligence generally and specific acts of negligence, including the violation of an ordinance. He also charged defendant with wilful and wanton misconduct in the operation of the truck. Defendant's answer denied that plaintiff was using due care for his own safety, or that it committed any of the negligent or wrongful acts charged, or that plaintiff's injuries were caused thereby. A trial before the court and a jury resulted in a verdict for the plaintiff for \$20,000. At the close of all the evidence plaintiff withdrew the charge of wilful and wanton misconduct. Motions by defendant for a directed verdict and for a new trial were overruled and judgment was entered on the verdict. Defendant appeals.

GEORGE V. YMA, a minor by his  
mother and next friend, ANNA YMA,

Appellee,

v.

DE VAY WOODEN CARBURETOR, INC., a  
corporation,

Appellant.

83-1-810  
JUSTICE COURT DEPARTMENT OF THE COURT

In a complaint filed in the Circuit Court of Cook County by George V. Yma, a minor, against De Vay Wooden Carburetor, Inc., plaintiff alleges that on January 22, 1942 defendant was operating his motor truck in a northerly direction in a certain alley at or near the intersection of the alley with 82nd Street in Chicago; that plaintiff, a minor, was a pedestrian crossing the alley at its intersection with 82nd Street; that he was using all due care and caution for his own safety; and that the defendant so negligently and carelessly operated his motor truck that as a proximate result thereof the truck was caused to run into, upon and against plaintiff, whereby he sustained injuries. The complaint alleged negligence generally and specific acts of negligence, including the violation of an ordinance. It also charged defendant with willful and wanton misconduct in the operation of the truck. Defendant's answer denied that plaintiff was using due care for his own safety, or that it committed any of the negligent or wrongful acts charged, or that plaintiff's injuries were caused thereby. A trial before the court and a jury resulted in a verdict for the plaintiff for \$25,000. At the close of all the evidence plaintiff withdrew the charge of willful and wanton misconduct. Motions by defendant for a directed verdict and for a new trial were overruled and judgment was entered on the verdict. Defendant appeals.



Plaintiff's theory is that defendant was negligent in the operation of its truck; that plaintiff was in the exercise of due care and caution for his own safety; that plaintiff was struck by the front of the truck as it came out of the alley; that because of defendant's negligence plaintiff sustained injuries of a serious and permanent character; that there was no material error in the proceedings; and that the amount of damages is not excessive. Defendant's theory is that the preponderance of the evidence, including the physical facts, show that plaintiff's injuries were caused by his climbing on the rear bumper of the truck and not by being struck by the front of the truck; that plaintiff's injuries were not caused by any negligence on the part of defendant; that the injuries were caused by the negligence of plaintiff; and that the damages are grossly excessive.

The mishap occurred on Thursday, January 25, 1945 at about 3:15 p.m. on the south side of 59th Street. It was daylight and visibility was good. Fifty Ninth Street runs in an easterly and westerly direction and has double street car tracks. An alley, running in a northerly and southerly direction, enters 59th Street from the south, but does not extend north of that street. The alley is from 125 to 150 feet west of Princeton Avenue, a street running in a northerly and southerly direction. The alley crosses the south sidewalk on 59th Street and at this point is about 15 feet wide. There are stop signs regulating traffic, requiring the 59th Street traffic to stop before crossing Princeton Avenue, a through street. There are signs west of Princeton Avenue on 59th Street warning motorists that there is a school in the vicinity. On the northwest corner of Princeton Avenue and 59th Street is St. Martin's Church. The church and school property extend west from Princeton Avenue along the north side of 59th Street

Plaintiff's theory is that defendant was negligent in  
 the operation of its truck; that plaintiff was in the rear  
 of the car and collision for his own safety; that plaintiff was  
 struck by the front of the truck as it came out of the alley;  
 that because of defendant's negligence plaintiff sustained injuries  
 of a serious and permanent character; that there was no negligent  
 error in the proceedings; and that the amount of damages is not  
 excessive. Defendant's theory is that the preponderance of the  
 evidence, including the physical facts, show that plaintiff's  
 injuries were caused by his collision on the rear bumper of the  
 truck and not by being struck by the front of the truck; that  
 plaintiff's injuries were not caused by any negligence on the  
 part of defendant; that the injuries were caused by the negligence  
 of plaintiff; and that the damages are grossly excessive.

The accident occurred on Thursday, January 26, 1928 at  
 about 2:15 p.m. on the south side of 50th Street. It was raining  
 and visibility was poor. Fifty Ninth Street runs in an easterly  
 and westerly direction and has double street car tracks. An  
 alley, running in a northerly and southerly direction, enters  
 50th Street from the south, but does not extend north of that street.  
 The alley is from 125 to 150 feet west of Princeton Avenue, a  
 street running in a northerly and southerly direction. The alley  
 crosses the south sidewalk on 50th Street and is about 10 feet  
 about 12 feet wide. There are two signs prohibiting traffic  
 crossing the 50th Street traffic to cross between Princeton  
 Avenue, a thorough street. There are signs west of Princeton Avenue  
 on 50th Street warning motorists that there is a school in the  
 vicinity. On the northwest corner of Princeton Avenue and 50th  
 Street is St. Martin's Church. The church and school property  
 extend west from Princeton Avenue along the north side of 50th Street

to a point west of the alley as projected. Just north of the church on the west side of Princeton Avenue is St. Martin's School. On the east line of the alley and the south line of 59th Street there is a frame shed which obstructs the view to the east as a person proceeding north emerges from the alley onto 59th Street. West of the alley and on the south side of 59th Street is a cottage which sets back from the south line of 59th Street and some distance west of the west line of the alley. The sidewalk on the south side of 59th Street adjoins the south building line of the street. A parkway separates the south sidewalk from the curb. The grade of the alley is somewhat higher than the grade of the pavement of the street, so that in going north out of the alley there is a small decline in the roadway from the alley toward the street. A considerable amount of snow had fallen on the street and in the alley and at the time of the occurrence snow had been piled up along the curb and in the parkway and lay in ridges at the mouth of the alley. The record does not show the total width of 59th Street from building line to building line, nor the width of the south sidewalk or of the parkway between the sidewalk and curb, but these measurements can be approximated from the photographs introduced. There was testimony that the width of 59th Street is 40 to 45 feet, but apparently the witness referred to the width from curb to curb. Photographs of the truck show it to be an automobile with enclosed body, sometimes referred to as a panel body, designed for delivery of light parcels. Some of the witnesses speak of it as a laundry truck.

George Wyma, the plaintiff, was born February 12, 1937 and became 8 years of age on February 12, 1945. At the time of the occurrence he lacked 19 days of being 8 years old. He was a pupil in first grade at St. Martin's school. He was also in first grade in that school the year before and was repeating his first

to a point west of the alley as suggested. Last north of the alley on the west side of Princeton Avenue is W. Martin's school. On the east line of the alley and the south line of 80th Street there is a frame shed which obstructs the view to the west as a person proceeding north emerges from the alley onto 80th Street. West of the alley and on the south side of 80th Street is a cottage which sets back from the south line of 80th Street and rear alley west of the west line of the alley. The sidewalk on the south side of 80th Street adjoining the south building line of the street, a pathway separates the south sidewalk from the curb. The grade of the alley is somewhat higher than the grade of the sidewalk of the street, so that in going north out of the alley there is a small decline in the roadway from the alley toward the street. A considerable amount of snow had fallen on the street west of the alley and at the time of the occurrence snow had been piled up along the curb and in the roadway and lay in ridges at the mouth of the alley. The record does not show the total width of 80th Street from building line to building line, nor the width of the south sidewalk or of the pathway between the sidewalk and curb, but these measurements can be approximated from the photographs introduced. There was testimony that the width of 80th Street is 40 to 45 feet, that apparently the witness referred to was within four or five feet of the track now is 25 to 30 feet wide with an automobile with an open body, sometimes referred to as a panel body, destined for delivery of light parcels. Some of the witnesses seem to it as a laundry truck.

George Yee, the plaintiff, was born February 11, 1907 and became 3 years of age on February 11, 1910. At the time of the occurrence he looked 12 days or 13 years old. He was a pupil in first grade at W. Martin's school. He was also in first grade in that school the year before and was repeating his first



grade work at the time of the mishap. Plaintiff's parents lived at 406 West 60th Street, which is a short distance west of Princeton Avenue and one block south of 59th Street. He had been attending school on that day and was on his way home. He had crossed 59th Street at the west crosswalk of 59th Street and Princeton Avenue and was proceeding west along the south sidewalk of 59th Street when, in some manner, he came in contact with defendant's truck while the truck was moving north out of the alley into 59th Street. Up to this point there is no dispute in the evidence. There is a conflict in the evidence as to what plaintiff was doing as he approached the alley, how he came in contact with the truck, what part of the truck he came in contact with and the exact cause of his injuries.

Defendant maintains that the verdict is contrary to the manifest weight of the evidence and that the court erred in overruling its motion for a new trial. Plaintiff insists that the verdict is supported by and in accordance with the weight of the evidence. When the truck came out of the alley onto the street an eastbound car was approaching the alley from the west and some distance west of the alley at that time. The witnesses vary in their estimate of the distance the street car was west of the alley when the truck entered the street. James Dougherty, defendant's driver, says the street car was approximately 150 feet or so west of the alley when the truck started down the incline to enter the street. Plaintiff's witnesses say that when the truck entered the street the distance between the street car and the alley was much less than 150 feet. The truck turned east on the eastbound street car track ahead of the street car and proceeded to Princeton Avenue, where it turned north and continued north on Princeton Avenue to about 53rd Street. There the driver stopped to make a delivery and was overtaken by a policeman who had followed him in another car from the scene of the mishap. The driver testified that he was unaware of the mishap



grade work at the time of the accident. Plaintiff's lawyer filed  
at 408 West 103rd Street, which is a short distance west of  
Avenue and one block south of 103rd Street. He had been attending  
school on that day and was on the way home. He had crossed 103rd  
Street at the west entrance of 103rd Street and had crossed Avenue  
and was proceeding west along the north sidewalk of 103rd Street  
when, in some manner, he came in contact with defendant's truck  
while the truck was moving north out of the alley into 103rd Street.  
Up to this point there is no dispute in the evidence. There is a  
conflict in the evidence as to what plaintiff was doing at the  
time he was in contact with the truck. Plaintiff says that he  
was at the time he came in contact with the truck and the truck  
was at the time he came in contact with the truck and the truck  
was at the time he came in contact with the truck.

Defendant maintains that the verdict is contrary to the  
weight of the evidence and that the jury acted in error  
in ruling the matter for a new trial. Plaintiff insists that the  
verdict is supported by and in accordance with the weight of the  
evidence. When the truck came out of the alley onto the street on  
eastbound car was approaching the alley from the west and was  
west of the alley at that time. The witness very in doubt  
of the distance the truck was west of the alley when the truck  
entered the street. James McGovern, defendant's driver, says the  
street car was approximately 100 feet or so west of the alley when  
the truck started down the incline to enter the street. Plaintiff  
witnesses say that when the truck entered the street the distance  
between the street car and the truck was about 100 feet.  
The truck turned east on the sidewalk west of 103rd Street at  
the street car and proceeded to 103rd Street, where it turned  
north and continued north on 103rd Street to 103rd Street.  
There the driver stopped to make a delivery and was standing by a  
collection was followed him in contact with the truck at the  
alley. The driver testified that he was driving at 103rd Street.

and had no knowledge of it until the policeman told him about it. Also proceeding in an easterly direction on 59th Street at the time was an automobile traveling west of the street car and operated by Michael Bovenizer.

In addition to the testimony of plaintiff in his own behalf, he called five witnesses to testify to facts and circumstances connected with or tending to show the cause of the mishap, namely, Michael Bovenizer, Mabel Callaghan, Francis Hagins, Jr., Joseph Harlin and Florence Marks. These witnesses, with the exception of Mr. Bovenizer, were riding on the street car. Mr. Bovenizer testified that he did not see the mishap. Mrs. Marks, who was riding in the street car, testified that when she first saw the boy he was lying on the west side of the alley between the sidewalk and the curbing. On behalf of defendant three witnesses testified to the facts connected with or tending to show the cause of the mishap. The first of these, James Dougherty, driver of the truck, testified that he did not see the mishap and that he did not know of it until his truck was overtaken by the policeman. The other two witnesses called by defendant were Kenneth Neilly and Thomas Ryan, two school boys of about plaintiff's age, who were attending St. Martin's School and who were also going home from school at the time and were proceeding along the south sidewalk of 59th Street between Princeton Avenue and the alley and were behind or to the east of plaintiff when he was hurt. Kenneth Neilly testified that he and plaintiff were going home from school; that just before the occurrence he was running after George; and that they were playing a game called "Cowboys." On cross examination he said that he "did not see the truck hit him"; that he saw the truck come out of the alley; that it did not stop; and that the left side "where the light is", meaning the headlight, hit plaintiff.



Thomas Ryan, on direct examination, testified that the three boys were running; that they were playing a game called "Cowboys"; that plaintiff was in front and Kenneth behind him; and that the car came out of the alley and he "slid right underneath it, and then George was hurt." On cross examination he testified that on the day before he testified he was in the office of the attorney for plaintiff who asked him to tell what he remembered; that he told the attorney at that time that the truck hit plaintiff as it came out of the alley; that he saw the truck come out of the alley; that the truck was going fast; and that after the truck hit plaintiff the conductor came over and pulled him over to the left side. It also appears that this attorney asked the boy to indicate on a photograph where the truck hit plaintiff and the boy pointed out the place on the picture "indicating the west side."

Plaintiff testified that he was going home from school with Tommy and Kenneth; that he was on the sidewalk on the south side of 59th Street; that he was the first one down the street; that they had been playing a game that day; that the other boys were a "couple of blocks" behind him; that they (the other boys) had crossed Princeton Avenue right there at 59th Street; that they were back towards Princeton Avenue; that they were walking; that he (plaintiff) was walking fast; that he wanted to hurry home; that, according to a point indicated on a photograph, he was at the west side of the alley when he was hit; and that the next thing he knew he was in the hospital. The adult witnesses for plaintiff did not see plaintiff before he came in contact with the truck, did not know where he came from or what he was doing when he came in contact with the truck. Defendant's driver testified that he drove north slowly through the alley; that when he came to the end of the alley he brought the truck to a stop; that he looked to the right and saw children down the block coming towards him; that he looked to the left and saw a street car down the street 150 feet or so; that he put



Thomas Ryan, on direct examination, testified that the boys were running; that they were playing a game called "tag"; that Plaintiff was in front and Kenneth behind him; and that the car came out of the alley and he "saw it right underneath it, and then George was hurt." On cross examination he testified that on the day before he testified he was in the office of the attorney for Plaintiff who asked him to tell what he remembered; that he told the attorney at that time that the truck hit Plaintiff as it came out of the alley; that he saw Kenneth come out of the alley; that the truck was going fast; and that after the truck hit Plaintiff the conductor came over and pulled him over to the left side. It also appears that this attorney asked the boy to indicate on a photograph where the truck hit Plaintiff and the boy pointed out the place on the picture "indicating the west side."

Plaintiff testified that he was going home from school with Tommy and Kenneth; that he was on the sidewalk on the south side of 80th Street; that he was walking east and down the street; that they had been playing a game that day; that the other boys were "couples of blocks" behind him; that they (the other boys) had crossed Princeton Avenue right there at 80th Street; that they were back towards Princeton Avenue; that they were walking; that he (Plaintiff) was walking fast; that he wanted to hurry home; that according to a point indicated on a photograph, he was at the west side of the alley when he was hit; and that Kenneth said he knew he was in the hospital. The agent witnesses for Plaintiff did not see Plaintiff before he came in contact with the truck, did not know where he came from or what he was doing when he came in contact with the truck. Defendant's driver testified that he drove north slowly through the alley; that when he came to the end of the alley he brought the truck to a stop; that he looked to the right and saw children down the block coming towards him; that he looked to the left and saw a street car down the street 150 feet or so; that he did



his car in first gear and started to pull out of the alley slowly, less than five miles an hour; that as he did so his wheels seemed to bind on the dry pavement, but suddenly let go and he made a right turn; that he stopped at 59th Street and turned left and headed north on Princeton Avenue; that he drove to 53rd Street and Princeton Avenue, where he stopped to deliver a suit of clothing at the home of his mother; that he made several stops for traffic signs between 59th and 53rd Streets; that when he had been at his mother's house a few minutes a policeman arrived and told him that there had been an accident; that this was the first knowledge he had of it; that he then drove back to the scene with the policeman; that there he saw the boy propped up on some clothing at the side of the curbing; that that was the first time he saw the boy; that he did not see the boy at all as he came out of the alley; that he could see the front of his automobile from where he was sitting; that as he came out of the alley he did not see any little boy walk in front of or come in contact with his car; that he did not feel any bump or impact, or hear any noise of anyone coming up against the side or the front of his car; that when he came up to 59th Street he brought his truck to a stop; that he did that because of his knowledge of the sidewalk and of the traffic conditions, also, because his view was blocked from the right by a shed on his right; that when he stopped the nose of his truck would be stuck out about a foot and a half; that when he stopped the truck there he could not see to the right; that he put his truck in first gear and proceeded slowly out; that he was standing still when he put the truck in gear; that as you go out about two feet your view to the right begins; that it came out so slowly that he gradually would see to the right; that when he started the truck up he could not see east of that building on his right

his car in first gear and started to pull out of the alley slowly, less than five miles an hour; that as he did so his wheels began to sink on the city pavement, and he gradually let go and he made a right turn; that he stopped at 50th Street and turned left and headed north on Princeton Avenue; that he drove to 32nd Street and Princeton Avenue, where he stopped to deliver a mail of clothing at the home of his mother; that he made several stops for mail delivery between 32nd and 34th Streets; that when he had been at his mother's house a few minutes a policeman arrived and told him that there had been an accident; that this was the first knowledge he had of it; that he then drove back to the scene with the policeman; that there he saw the boy propped up on some clothing at the side of the building; that that was the first time he saw the boy; that he did not see the boy at all as he came out of the alley; that he could see the front of his automobile from where he was sitting; that as he came out of the alley he did not see any little boy walk in front of or come in contact with his car; that he did not feel any bump or jolt or hear any noise of anyone coming up against the side of the front of his car; that when he came up to 50th Street he brought his car to a stop; that he did that because of his knowledge of the sidewalk and of the traffic conditions, also, because his view was blocked from the right by a shed on his right; that when he returned the nose of his truck would be stuck out about a foot and a half; that when he stopped the truck there he could not see to the right; that he put his truck in first gear and proceeded slowly out; that he was standing still when he put the truck in gear; that as you go out about two feet your view to the right begins; that it came out slowly that he gradually would see to the right; that when he started the truck up he could not see east of that building on his right

hand side; that after starting the truck up the first time he stopped again; that there is an incline there and he stopped as he went down the incline; that he went down slowly; that he had crossed the sidewalk when he made his other stop, which was a complete stop; that when he came to this second complete stop the front wheel or front of his truck was about in line with the curbing of the street; that the rear wheels of his truck at that time would be about the half way section of the sidewalk; that when he looked to the right as he came out slowly and got his vision, he saw children at the corner coming towards him, 100 feet away; that this was the only time he saw the children; that at that time the truck was level with the curb and the rear end would be about half way across the sidewalk; that when he first saw the children was when he pulled out and got his vision; that as he started to pull out slowly he looked to the right and saw the children; that when he saw the children the front wheels of his truck were on the sidewalk and the children he saw were coming towards him; that when he saw the children with his truck across the sidewalk they were a distance of at least 50 feet from him; that the street car when he first saw it was to the left down at the viaduct about 125 feet; that at that time the truck was on the walk; that that was the first time he saw the street car; that when he came up to the alley there was nothing to obstruct his view on the left; that the view to the right was the side he was interested in; that as far as the left was concerned the traffic was clear; that he looked right first, then he looked left when the street car was down by the viaduct; that when his wheels touched the end of the curb the rear wheels were holding on the ice, and the street car was coming at the same time; that he was stalled there because the wheels had been locked and when the street car was 15 or 20 feet away he was starting to pull out of the interlocking of the wheels; that he did not know how fast the street car was coming; that he looked at it and formed the opinion he would be able to get out of there without

hands; that after starting the truck he saw that it was  
 again; that there is an incline there and he stopped as he went  
 down the incline; that he went down slowly; that he had stopped the  
 sideways when he made his first stop, which was a considerable  
 that when he came to this second complete stop the truck was at the  
 front of his truck was about in line with the middle of the street;  
 that the rear wheels of his truck at that time would be about the  
 half way section of the sidewalk; that when he looked to the right  
 as he came out slowly and got his vision, he saw children at the  
 corner coming towards him, 100 feet away; that this was the only  
 time he saw the children; that at that time the truck was level with  
 the curb and the rear end would be about half way across the side-  
 walk; that when he first saw the children was when he pulled out and  
 got his vision; that as he started to pull out slowly he looked to  
 the right and saw the children; that when he saw the children the  
 front wheels of his truck were on the sidewalk and the children he  
 saw were coming towards him; that when he saw the children with his  
 truck across the sidewalk they were a distance of 50 feet;  
 from him; that the street car when he first saw it was 50 feet  
 down at the sidewalk about 100 feet; that at that time the truck was  
 on the walk; that that was the first time he saw the street car; that  
 when he came up to the city there was nothing to obstruct his vision  
 on the left; that the view to the right was the side he was approaching  
 in; that as far as the left was concerned the traffic was clear; that  
 he looked right first, then he looked left when the street car was  
 down by the sidewalk; that when his wheels touched the end of the curb  
 the rear wheels were holding on the ice, and the street car was  
 coming at the same time; that he was stalled there because the wheels  
 had been locked and when the street car was 15 or 20 feet away he  
 was starting to pull out of the interlocking of the wheels; that he  
 did not know how fast the street car was coming; that he looked at  
 it and formed the opinion he would be able to get out of there without



any trouble; that at no time did he see any children in front of his car; and that it was broad daylight, but cloudy and foggy.

In his brief defendant also summarizes the testimony of the occurrence witnesses called by plaintiff. Defendant carefully analyzes the testimony of and argues therefrom that the reliable and credible testimony, taken in conjunction with the physical facts, shows that plaintiff was not struck by the front of defendant's truck, as contended by plaintiff; that the only explanation of his mishap consistent with the reliable testimony and the physical facts is that plaintiff passed behind the truck as it came out of the alley and climbed on to the rear bumper of the truck near the left fender, and that he lost his hold on the truck as it passed over the ice at the mouth of the alley and fell off in the alley. We have read the transcript of the testimony and have carefully considered the analysis of the testimony made by the attorneys for the respective parties.

At the time of the mishap there was in effect an ordinance of the City reading:

"The operator of a vehicle emerging from an alley, driveway, or garage shall stop such vehicle immediately prior to driving onto a sidewalk, or across a sidewalk line projected across such alley, shall sound the horn of said vehicle, and shall exercise extraordinary care in driving upon said sidewalk or across such line."

There was credible evidence that defendant's truck was driven across the sidewalk without stopping and without sounding a horn. From the testimony the jury could reasonably find that plaintiff was struck by defendant's truck and left lying in the street. The driver was familiar with the scene of the mishap, knew the nearby presence of the school in the neighborhood, and that at 3:00 p.m. the pupils would be discharged from their classes and on their way home, and that as he drove through the alley he had to cross a sidewalk on which children might be walking or running. There was



any trouble; that at no time did he see any children in town.  
He said: and that it was never noticed, but during the night.

It is also noted that the following information was obtained from the file:

the occurrence of the same phenomenon in the past.

and credible testimony. There is confusion with the police

U.S. GOVERNMENT PRINTING OFFICE: 1967

From, as conducted by [redacted] and [redacted]

which coincides with the religious tradition and the

is that scientific research period the first 10 years out of 10

and also some of the other things that we had to do.

[illegible]

the ice at the mouth of the alley and half off in the alley.

have read the transcript of the testimony and have carefully

altered the analysis of the testimony and in the process to

the respective parties.

1. The time of death of the victim was about 10:00 p.m. on 10/10/77.

... tutti gli altri, e che non si può che essere...

THE ABOVE REPORTED ON 6/11/60 BY A REPORT TO THE U.S. AIR FORCE

exteriorly by the

There are certain things which are not to be done.

the witness, without showing any other evidence.

... ..

STATIONER, NEW YORK, N. Y. 10017

... ..

CD-3 de David R. Anderson, Jr. et al. 1994

[illegible]

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... ..

competent evidence that the plaintiff, a child of the age of seven years, was on the south sidewalk of 59th Street at the time of the occurrence; that defendant's truck was traveling north in the alley; that the truck did not stop at the sidewalk but pulled out into 59th Street; that plaintiff was at the west side of the alley when he was struck, having almost completed crossing the alleyway; that the street car and automobile moving east in 59th Street were forced to come to an emergency stop to avoid striking defendant's truck; and that defendant's truck swerved over on the north side of 59th Street and then proceeded east to Princeton Avenue, where, without stopping as required by the signs at that intersection, it entered Princeton Avenue and made a left turn. We are satisfied that the testimony presented a jury question as to the allegations of negligence on the part of defendant and of due care on the part of plaintiff and that the court was right in overruling defendant's motion for a new trial. We find that the judgment is not against the manifest weight of the evidence.

Defendant urges that it was error to give instruction No. 11, requested by plaintiff, reading as follows:

"If you find from the preponderance of the evidence in this case that the plaintiff at the time of the happening of the occurrence in question was of the age of seven years, then, in law, the degree of care of the plaintiff was that which an ordinarily prudent boy of the plaintiff's age, experience, intelligence and capacity would have exercised under the same or similar circumstances."

Plaintiff was seven years and eleven months of age at the time of the occurrence and the law charged him with using such care for his own safety as a person of his age, capacity, intelligence and experience would use under like circumstances. What is such reasonable care is a question of fact for the jury. See C. C. C. & St. L. R. R. Co. v. Scott, 111 Ill. App. 234; Fannon v. Morton, 228 Ill. App. 415. Defendant asserts that the jury would understand this



instruction to mean that if plaintiff was over seven years of age, then, in law, he was using, at the time of the mishap, such care for his own safety as a person of his age, experience, intelligence and capacity would use, thus leaving the jury to understand that there was no occasion for the jury to give any consideration to the question of plaintiff's due care; that the giving of the instruction deprived the defendant of its right to have the jury pass on a question material and essential to plaintiff's right to recover; and that this error can only be corrected by granting defendant a new trial in which it can be accorded the right to have the jury pass on the question of its liability under proper instructions. Defendant states, and we agree, that the question as to whether plaintiff used due care for his own safety was a substantial one under the evidence in the case; that an instruction on a material and substantive issue must not only state the law correctly, but the instructions, as a whole, must not be misleading; and that an erroneous instruction for one party is not cured by a correct instruction for the adverse party on the same subject. We agree that on material and substantive issues the instructions as a whole must be accurate, consistent and not contradictory or misleading.

We do not regard the instruction as peremptory. It does not direct a verdict or amount to directing a verdict. Plaintiff, in submitting the instruction, should have used the word "required" after the words "the degree of care". We do not believe that the jurors would understand or that they understood this instruction to tell them that the plaintiff was, in fact, exercising that degree of care required of a child of his age, experience, intelligence and capacity. We agree with plaintiff that to accept defendant's argument requires ignoring the last clause of the sentence commencing with "would have exercised" and that these words begin a clause



instruction to mean that it originally was under review (and was, then, in fact, under review) at the time of the hearing, such that for his own safety as a person of his age, education, intelligence and capacity would use, some involving the jury to understand that there was no occasion for the jury to give any consideration to the question of Plaintiff's due care; that the giving of the instruction deprived the defendant of the right to have the jury hear on a question material and essential to Plaintiff's right to recover; and that this error can only be corrected by granting a new trial in which it can be accepted the right to have the jury hear on the question of the liability under proper instructions. Plaintiff states, and we agree, that the question is to determine Plaintiff's due care for his own safety was a substantial one under the evidence in the case; that an instruction on a material and substantive issue must not only state the law correctly, but the instruction, as a whole, must not be misleading; and that an erroneous instruction for one party is not cured by a correct instruction for the adverse party on the same subject. We agree that on material and substantive issues the instruction as a whole must be accurate, consistent and not conclusively misleading. We do not regard the instruction as erroneous. It does not direct a verdict or assume to direct a verdict. Plaintiff, in submitting the instruction, should have used the word "should" after the words "the degree of care". We do not believe that the jurors would understand or that they anticipated this instruction to tell them that the Plaintiff was, in fact, exercising due care of care required of a child of his age, education, intelligence and capacity. We agree with Plaintiff that to accept defendant's argument requires ignoring the last clause of the sentence beginning with "would have exercised" and that these words begin a clause



modifying and explaining the preceding clause; that the two clauses taken together form a conditional sentence; and that when the sentence is considered as a whole, its context is conditional in nature. It was concerned with only one element, namely, the plaintiff's care. Defendant's given instruction No. 12 told the jury that contributory negligence was a defense; that contributory negligence means a failure by the person injured to exercise ordinary care for his own safety; and that contributory negligence means such conduct on the part of the plaintiff as prevents him from recovering. It is our view that the instructions as a whole were not misleading.

Finally, defendant maintains that the damages are excessive. Plaintiff was taken from the scene of the occurrence to St. Bernard's Hospital, where he remained for two months, or from January 25 to March 25, 1945, when he was taken home. While in the hospital he was under the sole care of Dr. Arthur G. Conrad, the family physician, and after he returned home Dr. Conrad visited him a few times at his home. Then plaintiff went to the doctor's office for examination at first twice and then once a week and he was still seeing the doctor at the time of the trial in May, 1946. He was confined to his bed the greater part of the time he was in the hospital, but beginning February 16, 1945 he was first up in a wheel chair and then every day thereafter he was up in a wheel chair for various times, 15 minutes, and then 30 minutes, and then later he was up 30 minutes in the morning and 30 minutes in the afternoon until March 20th. On March 20th he was up walking about and he continued to walk about part of the time until he left the hospital on March 25th. When he left the hospital he was walking on his feet without assistance, but was wearing a brace. Three doctors testified on behalf of plaintiff as to his injuries, namely, Dr. Arthur G. Conrad, Dr. Horace Turner and Dr. Leon Aries. Dr. Turner did not see the boy until February 22, 1946, more than a year after the occurrence, and Dr. Aries first

modifying and explaining the preceding clause; that the two clauses taken together form a conditional sentence; and that when the sentence is considered as a whole, its context is conditional in nature. It was concerned with only one element, namely, the claimant's care. Defendant's given instruction No. 12 told the jury that contributory negligence was a defense; that contributory negligence means a failure by the person injured to exercise ordinary care for his own safety; and that contributory negligence means such conduct on the part of the plaintiff as prevents him from recovering. It is our view that the instructions as a whole were not misleading. Finally, defendant maintains that the damages are excessive. Plaintiff was taken from the scene of the occurrence to St. Bernard's Hospital, where he remained for two months, or from January 23 to March 23, 1945, when he was taken home. While in the hospital he was under the sole care of Dr. Arthur C. Conrad, the family physician, and after he returned home Dr. Conrad visited him a few times at his home. Then plaintiff went to the doctor's office for examination at first twice and then once a week and he was still seeing the doctor at the time of the trial in May, 1945. He was confined to his bed the greater part of the time he was in the hospital but beginning February 16, 1945 he was first up in a wheel chair and then every day thereafter he was up in a wheel chair for various times, 15 minutes, and then 30 minutes, and then later he was up 30 minutes in the morning and 30 minutes in the afternoon until March 20th. On March 20th he was up walking about and he continued to walk about part of the time until he left the hospital on March 25th. When he left the hospital he was walking on his feet without assistance, but was wearing a brace. Three doctors testified on behalf of plaintiff as to his injuries, namely, Dr. Arthur C. Conrad, Dr. Monroe Turner and Dr. Leon Arnes. Dr. Turner did not see the boy until February 22, 1945, more than a year after the occurrence, and Dr. Arnes first

saw him on March 8, 1946. The attention of these two doctors was confined to making a physical examination and taking X-rays. The defendant called Dr. Clarence Hennan, Dr. Eric Oldberg and Dr. Edward L. Compere. Dr. Hennan examined the boy at the hospital at the request of defendant on February 7, 1945, when he examined the X-rays which had been taken at the hospital. Dr. Oldberg and Dr. Compere did not have an opportunity to examine the boy and testified as experts as to their findings and conclusions regarding the injuries as shown by the X-rays and the facts based on a hypothetical question.

There was evidence that prior to the occurrence plaintiff was in good health; that he had never been previously injured in the head or neck; that when Dr. Conrad, the family physician, visited him at the hospital on the afternoon the injuries were suffered, he, plaintiff, was unconscious, in a state of shock and had sustained numerous contusions and bruises on the body; that Dr. Conrad remained with him about an hour; that when he saw him again at 8:30 that evening he had regained consciousness; that Dr. Conrad's findings were inability of the patient to move his head or neck, a severe pain radiating into the head from the neck, an absence of the deep and superficial reflexes of the body, the loss of sensation in the lower limb and a marked rigidity of the posterior of the neck muscles; that these conditions indicated an injury to the spinal column; that Dr. Conrad put the boy in an apparatus known as a halter; that plaintiff remained in the halter for one week; that a plaster of paris cast encasing the head, neck and chest was applied during that week so as to maintain the position of hyperextension; that for six weeks the cast remained on; that prior to its removal a brace was ordered to maintain the position of the cervical vertebrae; that it was made of steel and had leather

see him on March 6, 1945. The attending physician at that time was confined to making a physical examination and taking history. The defendant called Dr. Clarence Hanson, Dr. W. H. Hanson and Dr. Edward J. Gossard. Dr. Hanson examined the boy at the hospital at the request of defendant on February 7, 1945, when he obtained the X-rays which had been taken at the hospital. Dr. Hanson and Dr. Gossard did not have an opportunity to examine the boy and testified as experts as to their findings and conclusions regarding the injuries as shown by the X-rays and the facts known on a hypothetical question.

There was evidence that prior to the defendant's injury the boy was in good health; that he had never been previously injured in the head or neck; that when Dr. Hanson, the family physician, visited him at the hospital on the afternoon the injuries were sustained, he, plaintiff, was unconscious, in a state of shock and had numerous contusions and bruises on the body; that Dr. Hanson remained with him about an hour; that when he saw him again on 8:30 that evening he had regained consciousness; that Dr. Hanson's findings were inability of the patient to move his head or neck, a severe pain radiating into the head from the neck, in absence of the deep and superficial tenderness of the body, the loss of sensation in the lower limb and a marked rigidity at the posterior of the neck muscles; that these conditions indicated an injury to the spinal column; that Dr. Hanson told the boy in an appropriate manner as a matter; that plaintiff remained in the hospital for one week; that a plaster of Paris cast encasing the head, neck and chest was applied during that week so as to stabilize the position of hyperextension; that for six weeks the cast remained on; that prior to its removal a brace was ordered to maintain the position of the cervical vertebrae; that it was made of steel and had leather



padding; that it encased the head and neck while its lower portion rested on the head and chest; that the brace was worn day and night for six months; that the doctor prescribed that he be permitted to take the brace off for a day or two at a time, but found that he complained of pain in the neck without it and that there was some swelling when it was absent; that Dr. Conrad noticed that there was a limitation of motion in opening and closing the jaw, also a recession of the lower jaw, conditions which were not present before the occurrence; that he found plaintiff inarticulate and having difficulty in pronouncing words; that plaintiff also lost weight, was given to vomiting; that there was an inability to assimilate his food; that he is still under the doctor's care and ~~wearing~~ wearing the brace at the doctor's direction; that since September, 1945 he has been attending a school for crippled children; that a bus takes him to and from school; that he now wears glasses; that he complains of head pains; and that at times his arm gets sleepy.

Dr. Leon Aries, a surgeon, who examined plaintiff on March 8, 1946, testified that on flexing plaintiff's head forward the head could be moved down into a position allowing the chin to come within two inches of the chest; that this is approximately 80% of the normal flexion; that on moving the head backward there was only about 50% of the normal motion; that on moving the head to the right and left the child likewise had only 50% of the normal motion; that these conditions are permanent; that on moving the head he found the erector-spine muscles to be in a state of spasm, a condition indicative of an attempt on the part of the body to immobilize that portion; that this indicated an underlying pathology; that an examination of the mouth revealed that the jaw could be



condition; that it showed the head and neck while the lower portion rested on the hand and chest; that the bones of the neck and spine for six inches; that the doctor prescribed that he be permitted to take the frame off for a day or two at a time, but found that he complained of pain in the neck without it and that there was some swelling when it was removed; that Dr. Howard advised that there was a limitation of motion in opening and closing the jaw, also a restriction of the lower jaw, conditions which were not present before the operation; that he found difficulty in swallowing and having difficulty in pronouncing words; that difficulty also lost weight, was given to vomiting; that there was an inability to swallow his food; that he is still under the doctor's care and taking wearing two braces at the doctor's direction; that since September, 1944 he has been attending a school for retarded children; that a case record was sent from school; that he now wears glasses; that he complains of head pains; and that he times his own teeth aching.

Dr. Leon Aron, a physician, who treated plaintiff on

March 2, 1946, testified that on February 1944, plaintiff's head (lower) the head could be moved down into a position allowing the chin to come within two inches of the chest; that this is approximately 50% of the normal flexion; that on moving the head backward (back) was only about 50% of the normal position; that on moving the head to the right and left the collar flexion had only 50% of the normal motion; that these conditions are permanent; that on moving the head he found the cross-bridge motion to be in a state of spasm, a condition indicative of an spasm on the part of the body to immobilize that portion; that this indicated an underlying pathology; that an examination of the mouth revealed that the jaw could be

moved to only 60% of its normal range of motion; that there was also a mal-occlusion of the jaw, meaning that his upper and lower teeth did not meet properly; that the upper teeth protruded approximately three eighths of an inch beyond the lower teeth; that witness was of the opinion that the condition of the teeth is permanent; and that the X-rays taken the day of the occurrence show a linear crack in the right portion of the surface of the first cervical vertebra and showed the odontoid process of the second cervical vertebra to be fractured so that the cervical body was dislocated. Dr. Horace E. Turner read plaintiff's Exhibit 12, an X-ray taken January 25, 1945. It showed a fracture through the odontoid process of the second cervical vertebra and also a fracture through the first cervical vertebra. Dr. Turner also diagnosed plaintiff's Exhibit 27, an X-ray, as indicating the disk between the second and third cervical vertebrae to be subluxated. He testified that the disk is a cushion of fibrous material located between the vertebrae; that in its center is a gelatinous material which acts as a shock absorber; that the disk helps absorb the shocks of the body; that by subluxation is meant a partial dislocation of one bone on the other; that the effect of this condition subjects the disk to an abnormal stress and exerts pressure on the nerves of that region; and that in witness's opinion these conditions are permanent.

Dr. Clarence Hannan testified that he has practiced medicine and surgery in Chicago since 1917 on the staff of several hospitals; that at the request of defendant he examined plaintiff and the X-rays at the hospital on February 7, 1945; that plaintiff was then in a cast; that he could not make a complete examination because of the cast; that he examined the eyes and that they were negative; that the pupils were round and equal and reacted to light and distance, which signified there was no brain injury; that the nose was normal; that the ears were normal; that there was

moved to only 60% of the normal range of vision; that there was  
 also a tail-extension of the jaw, meaning that the upper jaw  
 teeth did not meet properly; that the upper teeth protruded  
 approximately three eighths of an inch beyond the lower teeth;  
 that evidence was of the opinion that the condition of the teeth  
 is permanent; and that the X-rays taken for one of the purposes  
 above a linear crack in the right portion of the surface of the  
 right cervical vertebra and across the middle portion of the  
 second cervical vertebra in the fragment of that the cervical  
 body was displaced. Dr. Thomas H. Brown said that  
 exhibit 1, an X-ray taken January 19, 1935, showed a fracture  
 through the middle portion of the second cervical vertebra and  
 also a fracture through the first cervical vertebra. Dr. Brown  
 also testified that exhibit 2, an X-ray, was taken  
 the day between the case and which several references to be  
 submitted. He testified that the film is a condition of fracture  
 material located between the vertebrae; that in the body is a  
 definite fracture which was a sharp fracture; that the film  
 refers almost the shape of the body; that by observation it would  
 a certain displacement of the bone on the other; that the effect of  
 this condition suggests the film is an abnormal shape and would  
 measure on the basis of that weight; and that in evidence  
 opinion these conditions are permanent.  
 Dr. Thomas H. Brown testified that he has practiced  
 medicine and surgery in Chicago since 1915 on the staff of several  
 hospitals; that at the request of defendant he examined exhibit  
 and the X-rays at the hospital on February 7, 1935; that exhibit  
 was then in a cast; that he could not make a complete examination  
 because of the cast; that he examined the eyes and that they were  
 negative; that the pupils were round and equal and reacted to  
 light and distance, which signified there was no brain injury; that  
 the nose was normal; that the ears were normal; that there was

no paralysis of the face; that he answered questions alertly; that he was bright and alert, sitting up and playing in bed; that there were some bruises and lacerations but no deep injuries; that his reflexes were normal; that there was no paralysis; that the tendon reflexes in the knee and foot reacted normally and were negative; that Exhibit 12, the X-ray taken on January 25, 1945, which witness also examined on his visit to the hospital, shows the first cervical vertebra to be slightly displaced laterally about 2 mm., and that some injury could put it out of place; that as to Exhibit 16 taken on January 30, 1945, which he also saw at the hospital at the time of his visit, witness said that the film is not as clear as it should be, but it appears in comparison with the other film (Exhibit 12) that the first cervical vertebra is back in its normal position; that he did not see any evidence of any fracture in either film; that as to Exhibit 27, taken February 22, 1946 by Dr. Turner, witness said that the bodies of the vertebrae appear to be intact; that the intervertebral spaces are normal; that the spinous processes appear to be normal; that he did not see any evidence of any healed fractures in the picture; that in this film the bodies of the first and second vertebrae are closer together than normally; that he did not see plaintiff after February 7th; that what he found was a dislocation of the first cervical vertebra; that whether the dislocation was due to the injury he could not determine; and that the film did not indicate whether it was a fresh dislocation or otherwise.

Dr. Eric Oldberg stated that he is a neurologist and a neurological surgeon; that he is a complete specialist in that field; that he is the head of the department of neurological surgery at the University of Illinois; and that he did not examine the plaintiff. His testimony was confined to the interpretation of the X-rays



no paralysis of the foot; that no abnormal condition existed; that he was bright and alert, sitting up and playing in bed; that there were some tremors and fasciculations but no deep reflexes; that the reflexes were normal; that there was no paralysis; that the London reflexes in the knee and foot reacted normally and were normal; that Exhibit 12, the X-ray taken on January 22, 1942, which witness also examined on his visit to the hospital, shows the first cervical vertebra to be slightly displaced laterally about 2 mm., and that some injury would not be out of place; that as to Exhibit 13, taken on January 20, 1942, which he also saw at the hospital at the time of his visit, witness said that the film is not as clear as it should be, but it compares in comparison with the other film (Exhibit 14) that the first cervical vertebra is back in its normal position; that he did not see any evidence of any fracture in either film; that as to Exhibit 15, taken February 12, 1942, Dr. Turner, witness said that the bodies of the vertebrae appear to be intact; that the intervertebral spaces are normal; that the epiphyseal processes appear to be normal; that he did not see any evidence of any bony fracture in the disc; that in this film the bodies of the first and second vertebrae are almost completely fused; that he did not see a distinct fracture (Exhibit 16); that what he found was a dislocation of the first cervical vertebra; that whether the dislocation was due to the injury he could not determine; and that the film did not indicate whether it was a fresh dislocation or otherwise.

Dr. Eric Oldham stated that he is a neurologist and a neurological surgeon; that he is a graduate specialist in that field; that he is the head of the department of neurological surgery at the University of Illinois; and that he did not examine the plaintiff. His testimony was confined to the interpretation of the X-rays.



introduced as Exhibits 8 to 21 and 25 to 30. He explained in detail his interpretation of each of these films. He said that none of the films shows any abnormal condition or any pathology; and that each of the pictures exhibited a perfectly normal condition of the parts of the body which they represented. Regarding Exhibit 12 witness testified that he did not see any abnormality in this picture that he could say was due to trauma; that the fact that the films were those of a young person could be told from the size of the bones and also from the fact that the vertebral rami is not completely calcified; that the growing point of that piece of bone is still cartilage and therefore does not show in X-ray; that all bones, the bones of the skull, the long bones and the bones of the spine, start out as being mostly pieces of cartilage in which there are centers of ossification; that as time goes on until one reaches the age of 25, this calcification keeps on increasing, and finally the entire outline of the adult bone can be seen by X-ray, but in a young person so much of it as is still cartilage and is not completely calcified cannot be seen in X-rays; that Exhibit 16 is a view of the upper part of the cervical spine, that is, the spine and the neck through the open mouth; that it shows the second and third cervical vertebrae from that view; that he saw nothing abnormal in that X-ray; that he did not see the first cervical vertebra completely in that view; that he did not see any evidence of any fracture or any abnormality or deformity in that X-ray; that Exhibit 27 is a lateral view of the cervical spine of a child, with all of his second teeth coming in; that this spinal column is perfectly normal as is the vertebral canal through which the spinal cord passes; that he did not see any abnormality in that X-ray; that the second and third cervical vertebrae are normal with the normal spaces between them; that he did not see any evidence

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 the spinal cord passes; that the first part of the first series are not included in the report.  
 that the second and third cervical vertebrae are not included in the report. The following  
 with the normal second cervical vertebra; that the first part of the first series are not included in the report.

of any condition which would cause the person to have pain or to have numbness in his hands or feet, or to have a feeling of his hands going to sleep; that he did not see anything in the X-rays that would lead him to believe that the person should wear a brace on his neck or support his head with a brace; that he did not see anything in the films to indicate that any of the nerves have become involved; that from an examination of the plates they looked like plates in which there has been no injury; that he could not see any evidence in the bony structures, which are the only things which show in X-rays, that there has been any injury to the spinal cord.

Dr. Edward L. Compere is an orthopedic surgeon. He testified regarding his interpretation of Exhibits 12 to 16 and 27. He stated that Exhibit 12 is an X-ray of the neck region of the patient; that it is a picture of the bones of a child because the vertebral bodies are quite small and not fully developed; that it is a normal curve of the cervical spine and entirely normal vertebral bodies; that there is no evidence of any pathology or any lesion, either of fracture or dislocation; that he did not see any evidence whatsoever in the X-ray of any displacement or any fracture or subluxation; that the upper teeth project; that "the jaw teeth occlude rarely normal", so that except for this forward projection of the teeth the jaw is entirely normal; that it is not unusual to find this overbite in a normal child; that on the contrary it is unfortunately quite common; that there is nothing in this X-ray which would indicate that the condition is the result of any fracture or injury; that as to Exhibit 16 the odontoid process is entirely intact and normal; that he could not see any fracture or dislocation; that Exhibit 27 shows a normal X-ray of a child under ten years of age; that he did not examine plaintiff; that from an examination of the X-rays he did not see any evidence of any injuries to the boy's cervical spine; that he did not see any evidence that would

of any condition which would cause the witness to have pain or to have numbness in his hands or feet, or to have a swelling of his hands going to sleep; that he did not see anything in the X-rays that would lead him to believe that the person should ever be pressed on the neck or support the head with a pillow; that he did not see anything in the films to indicate that any of the bones have become involved; that there is no indication of the plates that looked like plates in which there had been no injury; that he could not see any evidence in the X-rays, which are the only things which show in X-rays, that there had been any injury to the spinal cord.

Dr. Albert J. Rosenberg is an orthopedic surgeon, in England, regarding the interpretation of X-rays. He is 45 years of age. He stated that Exhibit 19 is an X-ray of the neck region of the cervical spine. That it is a picture of the bones of a child between the ages of 10 and 12 years. That the bodies are quite small and not fully developed; that it is a normal curve of the cervical spine and entirely normal vertebral bodies; that there is no evidence of any deformity or any lesion, either of fracture or dislocation; that he did not see any evidence whatsoever in the X-ray of any displacement or any fracture or dislocation; that the upper teeth project; that the jaw teeth are normally normal, so that except for this forward projection of the teeth the jaw is entirely normal; that it is not unusual for this type of overbite in a normal child; that on the contrary it is extremely rarely quite common; that there is nothing in this X-ray which would indicate that the condition is the result of any fracture or injury; that as to Exhibit 18 the condition is entirely normal and normal; that he could not see any fracture or dislocation; that Exhibit 27 shows a normal X-ray of a child under ten years of age; that he did not examine Exhibit 18; that from an examination of the X-rays he did not see any evidence of any injury to the boy's cervical spine; that he did not see any evidence that would



cause him to believe that plaintiff should at any time wear a brace on the neck; that based on the facts stated in a hypothetical question and upon a study of the X-rays mentioned, he could see no reason for a surgical spine brace; that a very definite result of the patient wearing such a brace would be that the muscles would become rigid and spastic; that the very wearing of the brace may cause a condition of spasticity and rigidity of the back muscles; and that the prolonged spasticity of the cervical spine may produce a stiffness and fibrosis of the muscles, ligaments or soft tissue structure which are not being exercised and used.

Kenneth Reilly, a boy companion of plaintiff, testified that he had been playing with him recently; that they played guns, ball, bow and arrow and catch; that they played hide and seek; that while he was playing the games with him, plaintiff had something around his neck part of the time; and that the last time he played with him was a week before he testified. Thomas Ryan testified that he played games with plaintiff quite often since the mishap; that they played hide and seek, tag, cowboys and Indians; and that it was not very often that plaintiff had anything on his neck when they were playing their games.

The defendant carefully analyzes the testimony of Drs. Conrad, Turner and Aries and argues that the preponderance of the evidence shows that plaintiff's injuries were only of a temporary character and without any effects which would be the cause of any permanent distress or disability; that the amount of damages is so grossly excessive as to lead only to the conclusion that the jury was misled by the character of some of the evidence as to the actual injuries, and acted without weighing the evidence, or understanding the actual significance of the evidence, or from sympathy, prejudice



either him or believe that directly should of had him with a woman on the way; that being in the fact that in a hypothetical position and even a story of the -pays position, he could be in position for a similar woman - woman; that a very definite result at the ordinary evening with a woman which he had not known who became very and certain; that the very meaning of the woman was either a condition of certainty and belief of the man being; and that the proposed possibility of the physical body and position a witness and it was to be understood, however, he had to have statement which was not being discussed was done.

However, really, a very important in position, certainly that he had been talking with his identity; that they had been; that, "you had been and before; that they had been and that; that while he was playing was again with the, physically and then thing around the next part of the time; and the last time he played with him was a - and before he retired, - woman again testified that he played games with children and he played with him; that they played with him and, and, without the children; and that it was not very often that children had anything to him next when they were playing their games.

The statement certainly contains the following in fact, however, there are some who think that the representation of the witness about that identity's identity was not of a secondary character and it must not be taken as a witness who he was known to be permanent witness on identity; that the witness is known to be possibly - certainly as to fact only to the conclusion that the fact was stated by the witness it was of his witness in the fact; that, and what witness, without any witness, or testimony, the actual significance of the witness, or from witness, including

or other improper motive; that the alleged condition of stiffness or spasticity of the muscles of the neck is fully accounted for by the wearing of the brace; and that with the wearing of the brace discontinued and the head and neck permitted to have their normal and natural movements, any spasticity or swelling of the neck would disappear. Defendant also states that "it is pretty obvious that compelling this boy to wear this neck brace in the courtroom during the trial was a piece of stage setting, designed to excite the sympathy of the jury and thus enhance the damage." We cannot agree with defendant's contention that the preponderance of the evidence shows plaintiff's injuries were only of a temporary character and that the amount of the damages awarded is excessive. There was a conflict in the testimony of the physicians. The matter was submitted to the jury and the case was well presented. The jury believed the testimony which supported plaintiff's contention. We cannot say that the jurors were actuated by prejudice or sympathy, or by any other improper motive. Plaintiff made no contention that he had worn the brace continually. Dr. Conrad, the family physician, stated that he tried having the plaintiff go without the brace. We have no way of knowing that the wearing of the brace in the courtroom during the trial was stage setting, designed to excite the sympathy of the jury. Whether it was necessary for the boy to wear the brace was disputed in the testimony and something which the jury would necessarily be required to pass upon. He had a right to be at the trial. By the amount of the verdict the jury undoubtedly decided that it was necessary for plaintiff to wear the brace. Hence it would be necessary for the boy to wear the brace when he appeared in the presence of the jury. We cannot say



that there was any impropriety in his action. In our opinion there is sound basis in the evidence for the amount of the verdict returned by the jury.

For the reasons stated the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR.

that there was any responsibility in his action. In any event there is some basis in the evidence for the award of the verdict.

Verdict of the jury.

But the record shows the judgment of the jury was

of good cause, is sufficient.

THE COURT THEREUPON

SENT THE PRISONER TO THE PENITENTIARY.



DOLORES M. KEMPSKI,

Plaintiff - Appellant,

v.

LEONARD A. KEMPSKI,

Defendant - Appellee.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

335 L.A. 331

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Dolores M. Kempksi filed a complaint for divorce in the Superior Court of Cook County against Leonard A. Kempksi charging that he was guilty of extreme and repeated cruelty toward her. He answered denying the charges. In a trial before the court and a jury a verdict was returned finding the issues for the defendant. A motion for a new trial was denied and a decree was entered that "the prayer of the complaint for divorce be and is hereby denied." Plaintiff, appealing, asks that the decree be reversed and that the cause be remanded for a new trial. Defendant has not filed an appearance or briefs in this court.

Plaintiff maintains that the court erred in giving to the jury instruction No. 3 reading:

"The court instructs the jury that the plaintiff must prove her case by a preponderance of the evidence. This means that upon questions of fact which the plaintiff is required to prove; namely, that the defendant has been guilty of extreme and repeated cruelty, and that if the plaintiff has not proved that the defendant is guilty of extreme and repeated cruelty without cause or provocation on the part of the plaintiff that the defendant has been guilty of extreme and repeated cruelty, that the Jury must find the defendant not guilty."

In Von Glahn v. Von Glahn, 46 Ill. 134, the court said:

"Still, even in cases where the wife has been at fault, the violence of the husband must not be out of all proportion to the provocation, and if it is so, she will be entitled to her decree."

In Wesselhoeft v. Wesselhoeft, 369 Ill. 419, the court said (422):

"Appellant admits striking appellee on July 15, 1913. He claims he struck her because of her nagging and scolding. Provocative, abusive or insulting language, or even threats without some overt act, do not justify an assault or mitigate its consequences."

JAMES W. HENRY

JAMES W. HENRY - HENRY

V.

JAMES W. HENRY

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In Bissekumer v. Bissekumer, 324 Ill. App. 158, (abst.), the court said that in a divorce action by the wife an instruction respecting the wife's misconduct as justifying the husband's violence was erroneous where the jurors were not told what misconduct of the wife would justify the violence of the husband. Defendant's instruction No. 3, above quoted, does not define or attempt to define what cause or provocation on the part of plaintiff would be a sufficient justification for the defendant's alleged physical abuse of her. The instruction is confusing. Neither that instruction or any other instruction told the jurors what conduct would constitute sufficient provocation to justify or excuse the defendant for his alleged acts of cruelty. It was error to give this instruction.

We are of the opinion that the court was in error in giving defendant's instruction No. 4 reading:

"The court instructs the jury that in order to establish cruelty upon which a decree of divorce can be sustained means that the defendant must be guilty of physical acts of violence, bodily harm endangering life or limb, and such acts as raise reasonable apprehension of bodily harm and show state of personal danger incompatible with married state."

It will be noted that the conjunction "and," even if otherwise proper, should be "or". The law does not require the plaintiff to prove in addition to physical acts of violence endangering life or limb, "such acts as raise reasonable apprehension of bodily harm and show state of personal danger incompatible with married state." In Moore v. Moore, 362 Ill. 177, our Supreme Court said (179):

"Cruelty constituting ground for divorce under our statute means physical acts of violence, bodily harm or suffering, or such acts as endanger life or limb or such as raise a reasonable apprehension of great bodily harm. Bad temper, petulance, rude language, want of civil attentions, angry and abusive words, do not constitute extreme and repeated cruelty within the statute. Trenchard v. Trenchard, 245 Ill. 313; Maddox v. Maddox 189 id. 152; Henderson v. Henderson, 88 id. 248."





This instruction is erroneous in that it required plaintiff to establish her case by a degree of proof greatly in excess of that which has been held to be sufficient to entitle a plaintiff to a decree of divorce on the grounds of cruelty.

Plaintiff complains of defendant's instruction No. 7, reading:

"The court instructs the jury that the plaintiff must prove that any act of cruelty must be unprovoked, and that she, during the time of their marriage, was a kind, true and affectionate wife, and unless she proves this by a greater weight of the evidence, you are instructed to find for the defendant."

This instruction is similar to instruction No. 3, the giving of which we held to be erroneous. Plaintiff argues that it was error to give instruction No. 10, reading:

"The court instructs the jury that the plaintiff must prove, by a preponderance of the evidence, that the defendant was guilty of extreme and repeated cruelty and that the cruelty terms proved must be repeated actual violence."

It is the law in this State that proof of two or more acts of physical violence are sufficient to entitle the plaintiff to a decree of divorce. Farnham v. Farnham, 73 Ill. 497; Berlingieri v. Berlingieri, 372 Ill. 66. This instruction, by telling the jury that the plaintiff must prove extreme and repeated cruelty, without defining in any instruction what constituted "repeated cruelty", would be likely to confuse the jury.

We are of the opinion that defendant's instructions Nos. 2, 5, 8 and 9 are misleading and should not be given on a retrial of the case.

Plaintiff asserts that the court erred in giving the jury an excessive number of instructions concluding with the admonition to find the defendant not guilty, and that the court erred in giving an excessive number of instructions on the preponderance of the evidence. We are confident that on a retrial of the case the court will follow the suggestions in Gulich v. Ewing, 318 Ill. App. 506; Wm. Wrigley, Jr. Co. v. Standard Roofing Co. 325 Ill. App. 210.





Plaintiff urges that the court erred in permitting the trial of the case before a jury. No jury was demanded by either party. In view of the fact that plaintiff did not voice any objection to the trial before the jury until the motion for a new trial was filed, she is not in a position to urge this point. In a retrial of the case the provisions of the statutes concerning trial by jury should be followed.

We cannot agree with plaintiff's contention that the verdict is against the manifest weight of the evidence. In our opinion the case presented a factual issue for the jury to decide. The rule is well settled that where a case is close on the facts and its decision depends and must be determined upon conflicting testimony, the jury should be accurately instructed. Edwards v. Hill-Thomas Lime & Cement Co., 378 Ill. 180. Because of the erroneous instructions, we are of the opinion that the plaintiff should have a new trial. Therefore, the decree of the Superior Court of Cook County is reversed and the cause is remanded for a new trial.

DECREE REVERSED AND CAUSE  
REMANDED FOR A NEW TRIAL.

LEWE, P.J. and KILEY, J. CONCUR.

trial by jury should be retained. In the matter of the new law provisions of the judicial system, new trial was filed, and it was in a position to deal with the objection to the trial before the jury would have been the jury. In view of the fact that plaintiff did not know any trial of the case before a jury. The jury was composed of citizens. Plaintiff urges that the court tried to controlling the

1. The first step in the process of identifying a potential threat to national security is to determine whether the information in question is classified under the Espionage Laws. This is done by the National Security Council, which has the authority to classify information as "top secret," "secret," or "confidential." If the information is classified, it is then subject to the Espionage Laws.

new trial.  
Court of Cook County is reversed and the case is remanded for a  
should have a new trial. Therefore, the writs of the court  
errors are instructional, as any of the errors will result in  
Hill-Rosenberg & Jensen Co., 200 E. 111, 1907, 200 E. 111, 1907

1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 2622, 2623, 2624, 2625, 2626, 2627, 2628, 2629, 2630, 2631, 26

44088

MARION DANIELS,

Plaintiff - Appellee,

v.

GEORGE W. DANIELS,

Defendant - Appellee,

On Appeal of ALEX MEYEROVITZ,

Petitioner - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

3351A-931

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of January 15, 1947, denying the prayer of a petition of an attorney, in this cause, for fees.

1946

The petition was filed November 27th/against the defendant George W. Daniels. It alleged that Alex Meyerovitz, the petitioner, was retained by plaintiff Marion Daniels November 19, 1945; that December 8th he filed her Bill for Separate Maintenance in this cause; that December 27th George Daniels counter-claimed for Divorce; that petitioner on January 7, 1946 filed an answer, for Marion Daniels, to the counterclaim; that on January 11, 1946 he petitioned the court for temporary alimony and solicitor's fees for Marion Daniels and the matter was referred to a commissioner; that hearing on the petition was continued from time to time pending negotiations for settlement; that petitioner was instrumental in negotiating a property settlement in lieu of alimony; that the settlement included provision for weekly support payments for the minor child of the parties; that March 7, 1946 a petition was filed by Marion Daniels for leave to substitute other counsel for petitioner; that petitioner answered resisting the substitution unless his fees for services to Marion Daniels, were paid; and that he filed a statement of his services. He prayed for an allowance of reasonable attorney's fees.

RECEIVED

Plaintiff - Defendant

Plaintiff - Defendant

Plaintiff - Defendant

On appeal of the Plaintiff

Plaintiff - Defendant

RE. JUDICIAL REVIEW OF THE DECISION OF THE BOARD

This is an appeal from the decision of the Board, dated January 12, 1946,

granting the order of a petition of the Plaintiff, in that case,

for leave.

1946

The petition was filed November 27th/1945 and the

defendant George W. Smith. It alleged that the respondent,

the petitioner, was entitled to judicial review of his decision

in 1945; that December 2nd he filed his Bill for review.

Interference in this case; that December 2nd he filed his Bill for review.

ordered for review; that petition was on January 7, 1946 filed in

showing, for review, to the respondent; that on January 11,

1946 he petitioned the court for review of his decision.

leave for review and the order was referred to a committee;

that hearing on the petition was continued from time to time pending

negotiations for settlement; that petition was instrumental in

negotiating a property settlement in lieu of alimony; that the

settlement included provision for weekly support payments for the

minor child of the parties; that March 7, 1946 a petition was

filed by the petitioner for leave to substitute other counsel for

petitioner; that petitioner requested that the negotiation

unless his fees for services to the respondent, were paid; and

that he filed a statement of his services. He prayed for an

allowance of reasonable attorney's fees.



George Daniels answered and, among other things, denied that he owed fees and averred that petitioner's fees had been paid by Marion Daniels.

It appears from the record and briefs that in the latter part of January, 1946 Marion Daniels and petitioner had a disagreement about his claim for \$1,000 fees; that January 30th he sued her in the Municipal Court for \$1,000 fees, and that judgment was entered against him September 30, 1946; that Marion Daniels on March 7th in her petition for substitution advised the court of petitioner's suit and the necessity of her employment of counsel to defend her; that the instant petitioner's answer to that petition was stricken March 21st; that he filed a petition for fees against Marion Daniels in the cause April 2nd; that that petition was dismissed May 24th, reserving the question of petitioner's claim for fees against George Daniels "until the final disposition of said cause"; and that the marital litigation between Marion and George Daniels was determined by decree of January 16, 1947 without notice to him.

The order appealed from finds that Marion Daniels paid petitioner \$210 for services rendered in the Separate Maintenance - Divorce action and a previous Municipal Court proceeding related thereto, and that petitioner's suit for fees in the Municipal Court was decided against him. The court thereupon "being fully advised in the premises" denied the prayer for fees and dismissed the petition.

It is conceded that the court heard evidence upon the petition for fees. The evidence is not included in the record before us. We assume the court based its order on the evidence. We must presume that the order is proper. Sauter v. Pickrum, 373 Ill. 541; 3 Amer. Juris. p. 262; 4 C. J. S. p. 1692. It was petitioner's burden to show us from the record that the order was improper. Pease v. Kendall, 391 Ill. 193. Since the evidence is not before us petitioner cannot sustain his burden. We need go no further in the matter.

The order is affirmed.

ORDER AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

George Dennis answered that, among other things, knowing

that he was not and would not be, he had been

wild by John Dennis.

It comes from the record and other facts in the latter

part of January, 1946, when Dennis was arrested and taken to the hospital for a treatment.

There is also a letter from the hospital dated January 20, 1946, and the following was

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The order is attached.

ORDER ATTACHED.

44314

AUGUST GRAFFEO, also known as AUGUST  
RESTIVO,

Appellee,

v.

EDWARD F. O'BRIEN, TORCH CLUB, INC.,  
a corporation and CHICAGO TITLE AND  
TRUST COMPANY, an Illinois corporation,

Defendants.

On Appeal of TORCH CLUB, INC., a corporation.

Appellant.

INTERLOCUTORY

APPEAL FROM

SUPERIOR COURT

COCK COUNTY.

335 I.A. 332

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal from an order appointing  
a receiver for the Torch Club, Inc. in Chicago. The defendant  
Club only has appealed.

Plaintiff alleged that he had been a partner of O'Brien  
in the tavern business; that the business was incorporated into  
the Club and a third partner's interest acquired by plaintiff and  
O'Brien; that plaintiff had an agreement with O'Brien, under which  
each was to have 50 percent of the Club stock; that O'Brien has  
refused to issue the stock; that the Club business has been mis-  
managed and is insolvent; that while active in its management,  
plaintiff purchased \$6,500 United States Bonds with Club funds in  
the name of plaintiff or O'Brien; that O'Brien in 1942 bought  
real estate with Club funds; that the property was deeded to the  
defendant Trust Company for the nominal benefit of plaintiff and  
O'Brien; that he has offered to surrender the bonds to O'Brien to  
be cashed, and has demanded that the real estate be converted to  
cash, for the Club; that the offer and demand were refused; and  
that the Club affairs would be "wrecked" and plaintiff "greatly  
damaged" unless a receiver was appointed. He prayed for an

ALBANY, N. Y., MAY 10, 1901.

Dear Sir,

I,

JOHN J. HENRY, of the County of Albany, State of New York, do hereby certify that the within and foregoing is a true and correct copy of the original as the same appears on the records of the County of Albany, State of New York.

Witness my hand and seal of office at Albany, New York, this 10th day of May, 1901.

JOHN J. HENRY, County Clerk.

Attest:

JOHN J. HENRY,  
County Clerk,  
Albany, N. Y.

588.74.66

RECEIVED MAY 10 1901

This is to certify that the within and foregoing is a true and correct copy of the original as the same appears on the records of the County of Albany, State of New York.

JOHN J. HENRY, County Clerk.

Attest:

JOHN J. HENRY, County Clerk,  
Albany, N. Y.



accounting; a declaration that the bonds are Club property; a deed from the Trust Company to the Club; and an order compelling the issuance to him of a certificate for 50 percent of the stock.

O'Brien and the Club answered that since the appointment of the receiver was not sought as an incident to other relief, the application should be denied. Subsequently, each filed a Defence. The Club in its answer adopted O'Brien's allegations. No objection was made to this in the trial court. We shall consider, therefore, the allegations of O'Brien, so far as pertinent, as part of the Club's answer.

The defense pleaded is that plaintiff had not been a partner and had no interest in O'Brien's purchase of Finch's interest; that O'Brien's promise to give plaintiff 50 percent of the stock was absolved by the latter's dishonest mismanagement of the Club during O'Brien's illness; and that O'Brien owns all the Club stock. It is charged that plaintiff in May 1946 used \$20,000 Club money to purchase a competing Night Club and used Club funds to purchase one-half interest in the real estate in 1942. Insolvency is denied and efficient management by Loretta Hanson is averred. A contingent tax liability to the United States Government is admitted, but confidence expressed that "embezzlement" by plaintiff of Club assets would defeat the government claim. Plaintiff is charged with seeking the appointment of the receiver to rid himself of Club assets which he unlawfully converted and that the suit is a result of disclosures by Internal Revenue Agents of plaintiff's unlawful mismanagement. O'Brien in a Defence filed thereafter denied the partnership.

On plaintiff's motion the court on October 9, 1947 appointed the receiver to protect and operate the business. The receiver's bond was set at \$10,000 and plaintiff's at \$5,000, to be filed within five days.



accounting; a ledger which has been set up by the  
from the first entry to the last; in no other manner.  
reference to the account of the day.

part of the Club's answer.

Therefore, the allegation of "bias" on the part of the Club is unfounded. The Club is a non-sectarian organization, and its members are of various religious beliefs. The Club is not a religious organization, and its members are not required to be of any particular religion. The Club is a social organization, and its members are free to join or leave at will. The Club is not a religious organization, and its members are not required to be of any particular religion. The Club is a social organization, and its members are free to join or leave at will.

[illegible]

thereafter denied the opportunity.

On Plaintiff's motion the court on October 5, 1957, appointed the receiver to protect and operate the business. The receiver's bond was set at \$10,000 and Plaintiff's at \$2,500. The case was filed within five days.

By order entered November 12, 1947, the trial court record was corrected nunc pro tunc by amending the order appealed from to show that the court heard the testimony of witnesses before appointing the receiver. On November 17, 1947, a stipulation was filed in the trial court to show that before appointing the receiver the court examined and considered the defense pleadings.

The appointment of the receiver is not the only relief sought. There was no need therefore to deny the application for that reason. The Club complains that plaintiff alleged a mere conclusion that it is insolvent. Since there was evidence taken we must assume that there was proof of insolvency sufficient to convince the court. Sauter v. Pickrum, 373 Ill. 541. The brief of the Club is devoted mainly to reciting and expounding upon the averments in the defendant's pleadings. Evil motives are imputed to the plaintiff. The corporation says that "it is unfortunate that the trial court did not enter findings or give reasons for the appointment." There is no requirement that the court do so. Section 64 (3) C. P. A. It is the appellant's burden to present a record in this court upon which we can test the action of the trial court. Pease v. Kendall, 391 Ill. 193.

The Club says that the amended complaint failed to allege that it was a party to the contract with O'Brien or that he acted for it with authority. It is our view that this was not necessary to bring about the appointment of a receiver. There would be little hope for actual gain in obtaining the stock or accounting of the Club if its affairs were permitted to continue under mismanagement.

The Club says that its affirmative defenses were not replied to by the plaintiff and that they were, therefore, admitted. It may be that there was evidence introduced to sustain the affirmative defenses, in which case the replies would be waived. Motusas v. Acme Burial Assn., 319 Ill. App. 106.



Defendant contends that there was error in allowing 5 days for the filing of the bonds, without qualifying the appointment until the filing of the bond. The bonds were filed and there is no complaint that they are not sufficient. On the night the order was entered the receiver appeared at the Club demanding possession but withdrew after a conference between the Club operators and attorneys. The Club carried on its own business until October 13, when the bonds were filed. This indicates that the receiver did not take possession until the bonds were filed, consequently, without conceding merit in the contention, we see no injury to the Club.

We see no need to consider arguments based on what witnesses there were or were not. The transcript is not before us. In view of our conclusions hereinbefore with respect to the absence of a transcript of the evidence, we need not consider the legal points set forth under Points and Authorities. Moreover, the points were not argued and the cases not cited under Argument.

What may be the final result in the case is not relevant now. The trial court on what was before it apparently was satisfied that there was sufficient cause for the appointment of the receiver. From the record before us we cannot say that there was error in making the appointment. The order is, therefore, affirmed.

ORDER AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.

Defendant contends that there was error in allowing 5 days for the filing of the bonds, without qualifying the statement until the filing of the bonds. The bonds were filed and there is no complaint that they are not sufficient. In the meantime the order was entered the receiver appeared at the U.S. District Court possession but withdrew after a conference between the U.S. District Court and attorneys. The club carried on its own business until October 15, when the bonds were filed. This statement that the receiver did not take possession until the bonds were filed, consequently, without conceding itself in the meantime, we see no injury to the Club.

We see no need to consider arguments based on what witnesses there were or were not. The Commission is not before us in view of our conclusions regarding the receiver's record in the absence of a transcript of the evidence, we need not consider the facts points set forth under points and authorities. Moreover, the points were not argued and the case was closed under argument. That may be the final result in the case is not relevant now. The Club seems to want to know if a transcript was filed and that there was sufficient cause for the appointment of the receiver. From the record before us we cannot say that there was error in making the appointment. The order is, therefore, affirmed.

ORDER AFFIRMED.

LEWIS, P. J. AND HENRY, J. CONCUR.



STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT  
OCTOBER TERM  
A.D. 1947

FILED

JUN 25 1948

Stanley Brown  
CLERK OF THE APPELLATE COURT

Term No. 4708

Agenda No. 1

THE PEOPLE OF THE STATE OF  
ILLINOIS,  
  
Plaintiff in Error,  
  
vs.  
  
JOHN T. CONNORS, JOHN T.  
ENGLISH, ALBERT P. LAUMAN,  
LEO J. DOUGHTERY and  
JOSEPH GANSCHINETZ,  
  
Defendants in Error.

Writ of error  
  
to the Circuit Court  
  
of St. Clair County.

333 I.A. 383

CULBERTSON, J.

This is a writ of error to review a judgment entered in the Circuit Court of St. Clair County, Illinois, allowing a motion to quash an indictment returned against Defendants in Error, who are the Mayor and four Commissioners of the City of East St. Louis. The indictment charged them with palpable omission of the performance of their official duties in that they failed to suppress certain gambling houses and slot machines in operation in East St. Louis on December 9, 1946 and immediately prior thereto.

The indictment was set out in two counts and certain persons were listed by name and street number where gambling houses or slot machines were operating with the full knowledge of the accused of the existence and operation of the places, and cited failure of the defendants to take any action towards suppressing such operation, and also contained an allegation that in addition thereto other slot machines were kept and operated "in practically every licensed tavern and place where liquor was sold within the said City."

In the motion to quash the indictment defendants contended that the indictment was bad as being vague and indefinite and



insufficient to inform the accused of the gambling houses and slot machines they were accused of failing to suppress. It was also contended by the defendants that under the provisions of the Statute and city ordinances, the government of the City was divided into five departments, and that the city ordinance prescribed the duties of the heads of the various departments and that, therefore, each department head is responsible only for matters that occur in his own department. They maintained that the Mayor and the Commissioners are not subject to a joint indictment for failure to suppress gambling houses or the enforcement of the laws of the State or the <sup>ordinances</sup> ~~ordinances~~ of the City. The Court below sustained the contention of the defendants that the accused are not liable or subject to a joint indictment, and held that both counts of the indictment are fatally defective for that reason.

In connection with the Writ of Error in this Court a motion had been made to dismiss the Writ of Error and in the alternative, to strike from the files of this Court the purported abstract of record filed by the plaintiff in error, and to grant further time in the alternative to defendant in error to file briefs. The motion for an extension of time to file briefs has already been granted. The motion to dismiss the Writ of Error on the ground that the abstract is defective sets forth no substantial grounds upon which the abstract should be stricken.

It is contended by plaintiff in error in this Court that the Court below improperly allowed the motion to quash the indictment upon the authority of such cases as PEOPLE vs. UZZELL, 173 Ill. App. 257, in which case the mayor of Granite City was charged with failure to perform his official duties to suppress gambling and in which indictment the names of nine persons who were alleged to operate gambling devices were set forth. The Court in that case indicated that while each count may contain surplusage, yet the counts could be sufficient to properly apprise the accused of the nature of the offense with which he is charged, and that the



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FOURTH DISTRICT

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333 I.A. 334<sup>1</sup>

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entered accordingly and this appeal is taken from that judgment.

The sole question before this court is whether or not Garrison was negligent in handling this particular car of peaches.

Garrison sent trucks to the plaintiff's packing house, August 17, 1945, and hauled the peaches in question to the railroad siding at Centralia and, they were loaded in a pre-iced refrigerator car which he had ordered from the Missouri-Illinois Railroad. The car was billed out the morning of August 18th to Cochrane Brokerage Company of Kansas City, Missouri, and billing ordered, "Standard Refrigeration -- add 5% salt at all regular icing stations". No inspection was made by Garrison or his employees concerning the ice in the car before it left Centralia and no request was made of the railroad to have it re-iced there. The temperature was high when the peaches were loaded at Centralia but they were firm and sound and graded No. 1.

The car had been iced at Dupu, Illinois, at 3:00 o'clock in the afternoon of the 16th with 10,000 pounds of ice. When the car returned to Dupu the morning of the 19th it required 9,700 pounds of ice to fill the bunkers. It was re-iced again at Kansas City at 7:10 A.M., August 20th with 3,500 pounds of ice.

When inspected in Kansas City the report stated that the peaches were good size; quality, extra well blushed; none to 5% mechanical injuries; 70% full ripe and 30% dead to soft ripe; brown rot decay ranging from 50% in some baskets to 20% in others, mostly averaging 30%; some advanced. The peaches being not salable were sold for freight charges.

The plaintiff contends that Garrison was negligent in the manner in which he handled the shipment of the peaches in that he failed to have the car re-iced at Centralia before its departure. The defendant however maintains that the decay resulted not from the low state of the ice in the bunkers when the car reached Dupu, but because the peaches were from an orchard which was infected with brown rot.



The only conflict in the evidence is degree of brown rot in the plaintiff's orchard and effect this disease, if present, would have upon a carload of peaches travelling from Centralia to Kansas City. However, the evidence shows that brown rot was definitely present in the plaintiff's orchard.

Brown rot is fungus disease, which is often found in peach orchards. It attaches itself to the foliage or bark of the trees and the spores are carried by dust to the fruit. The spores attack the fruit and cause it to decay. The decay, once it starts, spreads rapidly to other fruit which comes in contact with it.

Evidence was introduced to show that peaches exposed to brown rot, which were shipped in a refrigerator car, might appear to be grade 1, and pass inspection, but would decay in transit in a period of 48 hours.

There was evidence introduced to show that under the traffic regulations the railroad is not required to re-ice cars except at regular icing stations and that Centralia was not an icing station for the Missouri-Illinois Railroad. However, we are not concerned with the question of the liability of the carrier.

It does not appear from the evidence that Garrison had knowledge that Centralia was not a regular icing station for the Missouri-Illinois Railroad.

The plaintiff either knew, or was properly charged with knowledge that brown rot was present in his orchard. The plaintiff should have informed Garrison of this fact as this information would have had an important bearing upon the distance Garrison would have shipped the peaches. There was a positive burden upon the plaintiff to prove by a preponderance of the evidence the negligence of Garrison, in connection with his handling of the peaches, and his own freedom from contributory negligence (*Loeb v. Corrie*, 327 Ill. App. 660). In giving consideration to the question of whether or not the finding of the trial court is contrary to the manifest weight of the evidence, a reviewing court must have regard





for the better opportunity of the trial court to determine the facts by reason of its opportunity to see and hear the witnesses (Loeb v. Corrie, supra; Marble v. Estate of Marble, 304 Ill. 229, 232; Floyd v. Estate of Smith, 320 Ill. App. 171, 177). The judgment of the trial court, who has heard evidence and seen witnesses, will not lightly be interferred with by a reviewing court (Pure Torpedo Corp. v. Nation, 327 Ill. App. 28, 41). A reviewing court will accept the findings of the trial judge upon questions of fact based upon statements of witnesses unless such findings are clearly and palpably erroneous (Floyd v. Estate of Smith, supra).

A fair and candid consideration of all the evidence brings us to the conclusion that Garrison did all that a reasonable and prudent commission agent would have done, under the circumstances of this case, in handling the carload of peaches in question. An agent is not an insurer. In our opinion he exercised reasonable skill, care and diligence in billing this carload of peaches. It was not shown that he had knowledge that the peaches had been exposed to brown rot and it was the responsibility of the plaintiff to advise him of this added hazard.

We find that the judgment of the trial court is not against the manifest weight of the evidence, and that its findings are not clearly and palpably erroneous, but that such findings of fact are in harmony with the weight of the evidence.

There being no error in this case the judgment is affirmed.

Affirmed.

Bartley, P.J. and Culbertson, J.. concur

To be published in abstract only.

FILED

JAN 26 1948

*Stanley B. Brown*

CLERK OF THE APP. COURT OF  
FOURTH DISTRICT OF ILLINOIS

المجلد الثاني

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT  
OCTOBER TERM  
A.D. 1947

Number 4707

Agenda 5

William Milhahn, et al )  
Plaintiffs-Appellants, )  
vs. )  
WARD A. WICKWIRE, )  
Defendant-Appellee. )

Appeal from the  
Circuit Court of  
Wayne County, Illinois

332 I.A. 384<sup>2</sup>

SMITH, J.

This cause comes to this court on appeal from an order of the trial court, entered on March 6, 1947, dismissing the plaintiff's notice of appeal, previously filed, as to the defendant, Ward A. Wickwire.

The principal issues on the merits were presented to this Court in another appeal, in cause No. 47M14. This cause came on for hearing on the merits before the Circuit Court of Wayne County, Illinois, on the 20th day of March, 1946, and afterward during the hearing of said cause by the trial court, the defendant, Ward A. Wickwire, by his counsel, moved the court to enter an order dismissing said cause as to said defendant, Ward A. Wickwire, which motion was allowed by the court, and an order was duly entered by the trial court on Nov. 7, 1946 dismissing said cause as to said defendant for want of equity.

The material part of said order to be considered on this appeal being the findings of the Court, and the order exclusive of preliminary statements, as follows:

1. That the Court has jurisdiction of the subject matter hereof and the parties hereto.
2. That the plaintiffs have failed to maintain the material allegations of their complaint as to the defendant, Ward A. Wick-



wire, and that his motion to dismiss said complaint as to him should be allowed.

3. That the equities of this cause are with the defendant, Ward A. Wickwire, and against the plaintiffs.

Wherefore, It Is Ordered, Adjudged and Decreed that the aforesaid motion of defendant, Ward A. Wickwire, be and the same is hereby allowed; that the plaintiffs have failed to prove or sustain the material allegations of their said complaint as to defendant, Ward A. Wickwire, and that upon said pleadings and proofs the equities of this cause are with said defendant and against the plaintiffs.

It is further ordered, adjudged and decreed that this cause be and the same is dismissed for want of equity as to said defendant Ward A. Wickwire.

It is further ordered, adjudged and decreed that the costs of said defendant, Ward A. Wickwire, be and they are hereby assessed against said plaintiffs and that execution issue therefor.

(Entered as of Nov. 7, 1946\*\*\*\*\*)

The trial then proceeded as to the remaining defendants, and on January 31, 1947 the trial court dismissed said complaint as to the remaining defendants, for want of equity.

Plaintiffs filed no notice of appeal within 90 days after the entry of the order of Nov. 7, 1946, but on Feb. 11, 1947 without leave of this Court, filed a single "Notice of Appeal" from the two decrees entered by the court, to-wit, the one of Nov. 7, 1946 and Jan. 31, 1947, with the clerk of the trial court. Defendant Wickwire thereupon filed his motion asking that said purported Notice of Appeal be stricken or dismissed as to him, upon the ground, that having been filed after the expiration of said 90 day period, and without special leave of the reviewing court, said notice of appeal was wholly without legal sanction, a nullity, void, etc. On March 6, 1947, following consideration of Suggestions and Authorities, submitted by the respective parties, the





Circuit Court sustained said motion and ordered said purported notice of appeal stricken and dismissed insofar as it pertained or referred to defendant, Wickwire.

The cause is now before us on the appeal taken from the order of March 6, 1947, so dismissing and striking said notice of appeal filed on Feb. 11, 1947. The propriety of the Circuit Court's decree entered "November 7, 1946" is not involved.

Plaintiffs rely on seven statements of alleged error committed by the trial court, the second of said points being that "The trial court erred in holding that said decree of November 7, 1946 was a final decree".

After a careful consideration of the record, briefs, and arguments before us, we are of the opinion that the order entered by the trial court of November 7, 1946 was a final order. Procedural distinctions between actions at law and suits in equity have been generally abolished. (Section 31, Civil Practice Act., Par. 155 Ch. 110, Ill. Rev. Stats., 1945, Bar Ass'n Ed.). The final decision from which an appeal lies does not necessarily mean such decision on decree, only, which finally determines all the issues presented by the pleadings. It may, with equal propriety, refer to the final determination of a collateral matter, distinct from the general subject of the litigation, but which, as between the parties to the particular issue settles the rights of the parties. Such an order is final and appealable. (Brauer Supply Co.---v.---Truck Co., 383 Ill. 569.)

The right of appeal is purely statutory and must be availed of, if at all, in strict conformity with the Statute. (Johnson v. Cook County, 368 Ill. 160, 161).

No appeal shall be taken to the Supreme or Appellate Court after the expiration of 90 days from the entry of the order, decree, judgment or other determination complained of, \*\*\*Sec. 76 Civil Practice Act; Section 200, Ch. 110, Ill. Rev. Stats. 1945, Bar Ass'n Ed.



In view of our opinion as to the finality of the order entered Nov. 7, 1947, it will be unnecessary to consider the other alleged errors urged in this appeal.

We are of the opinion that the order entered by the trial court on March 6, 1947, striking the purported notice of appeal, was correct, and the same is hereby affirmed.

AFFIRMED.

BARTLEY, P.J. and CULBERTSON, J. concur

Publish in abstract only.

FILED

JAN 31 1948

*Stanley R. Brown*

CLERK OF THE APPELLATE COURT  
COURT HOUSE, INDIANAPOLIS, IND.

REPTILES



43056

RUTH WILL (MUELLER),  
Appellee,

v.

1527-31 WICKER PARK AVENUE BUILDING  
CORPORATION, a corporation, ELM PARK  
HOTEL COMPANY, a corporation, and  
AMERICAN FORK & HOE COMPANY, a cor-  
poration,

Defendants.

ELM PARK HOTEL COMPANY, a corpora-  
tion,

Appellant.

APPEAL FROM  
SUPERIOR COURT  
COOK COUNTY.

335 I.A. 385

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

This appeal is before us for the third time. Our reversal of the judgment in favor of plaintiff (324 Ill. App. 264) was reversed by the Supreme court (391 Ill. 391) and the case remanded with directions. We again reversed the judgment (328 Ill. App. 214) and were again reversed by the Supreme court (398 Ill. 60) and the cause remanded with directions.

Plaintiff's action was for personal injuries claimed to have been sustained by being struck by a piece of steel from the head of a hatchet when struck by a hammer in removing certain linoleum preparatory to repairing the floor of the restaurant in defendant's building in which plaintiff was working. The Supreme court had held that there is evidence in the record tending to show negligence in the improper use of the hatchet in the repair of the floor and in failing to provide proper warning or safeguards which would have prevented injury to plaintiff, and that the trial court properly submitted the issue to the jury. The evidence is sufficiently stated by this court in its former opinions. Defendant offered

WUTH WILL (WUTHILL),  
Associates,

v.

1887-81 FICKER FARM LUMBER MILLING  
CORPORATION, a corporation, and  
GUTHRIE COMPANY, a corporation, and  
AMERICAN FARM & HOME COMPANY, a cor-  
poration,  
Defendants.

THE STATE OF CALIFORNIA, a party,  
Plaintiff.

AMERICAN FARM  
AND HOME COMPANY  
DOES NOT DENY.

This appeal is taken as for the first time, and

reversed of the judgment in favor of plaintiff (see Ill. App.

334) and reversed by the Supreme Court (Ill. 111, 201) and the

case remanded with instructions. In such remand for the

(see Ill. 111, 201) and some other reasons as are shown

court (Ill. 111, 201) and the same remanded with instructions.

Plaintiff's appeal was for reversal of the judgment

to have been obtained by a writ of habeas corpus.

The head of a hatchet was found by a witness to be

near the firehouse property in connection with the

restaurant in defendant's building in which plaintiff was

working. The Supreme Court has held that it is

in the record failing to show negligence as the ground for

of the hatchet in the vicinity of the firehouse is sufficient to

provide proper warning of defendant's action would have been

vented injury to plaintiff, and that the trial court properly

submitted the issue to the jury. The Supreme Court is unanimously

stated by this court in its former decision. Defendant offered

2.

no testimony in defense of the action and there is no conflict in the evidence as to any material fact. Differences of opinion, if any, as to defendant's negligence can arise only from inferences to be drawn from undisputed facts. What inference should be drawn was primarily a question for the jury.

In respect to defendant's contention that causal connection between the disabilities complained of and plaintiff's alleged injury is not shown, the physician called by plaintiff as an expert established such connection between the injury and the disability shown on the trial in his answer to a hypothetical question approved by the Supreme court, defendant's counsel neglecting and refusing to point out the essential facts claimed to have been omitted from the question. The answer is not contradicted.

We cannot say that the verdict of the jury, approved by the trial court, was against the manifest weight of the evidence. The judgment is affirmed.

AFFIRMED.

Feinberg and O'Connor, JJ., concur.

no testimony in defense of the action and there is no conflict in the evidence as to any material fact. The defendant's negligence is not shown, as to defendant's negligence one could only infer from the evidence to be drawn from undisputed facts. That inference should be drawn was primarily a question for the jury.

In respect to defendant's conduct, a fact would emerge from between the allegations contained in the complaint and the facts as shown, the physician called to defendant as an expert established such connection between the injury and the disability shown on the record as to be a proximate cause. The question approved by the Supreme Court, *Robinson v. Superior Court*, 194 Cal. 271, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It cannot say that the action is barred by the statute of limitations, the statute, was applied to the facts of the case. The judgment is affirmed.

REVEREND.

Robinson and O'Connor, Jr., answer.

44096

PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. HENRY E. MARSKI,  
Petitioner and Appellee,

v.

BERNA BROWN, MARY KILBURG and  
FRANK CASELLA,  
Respondents-Appellants.

APPEAL FROM COUNTY COURT  
COOK COUNTY.

335 I.A. 385<sup>2</sup>

MR. PRESIDING JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Respondents appeal from a judgment holding them guilty of contempt as election officials and sentencing them to the county jail for a period of 90 days.

They were election officials in the 19th precinct of the 1st ward in the City of Chicago at the judicial election held June 3, 1946, and were charged with permitting applications containing forged signatures of voters to be presented and filed, and ballots cast in the names of such persons. On the trial respondents moved for a transfer of the cause because the trial judge was a candidate for re-election at the succeeding November election. As held by us in Peo. ex rel. Marski v. Belvedere, No. 44012, opinion filed January 5, 1948, the court did not err in denying this motion.

The evidence shows that Verna Brown and Mary Kilburg were judges of election, and Frank Casella a clerk. The remaining election officials were not apprehended. Brown served as the judge at the ballot box, initialing ballots and delivering them to voters after the approval of the voters' applications by the remaining judges. She took sick about 11 o'clock a. m. and absented herself until 3:30 p. m. when she spindled or filed applications of voters until the close of the election.



PEOPLE OF THE STATE OF ILLINOIS,  
 ex rel. HENRY E. MARSH,  
 Petitioner and Appellee,

v.

BENJAMIN BROWN, HARRY KILGUS AND  
 FRANK CASSELLA,  
 Respondents-Appellants.

APPEAL FROM COUNTY COURT  
 COOK COUNTY.

Respondents appeal from a judgment holding them guilty of contempt as election officials and sentencing them to the county jail for a period of 90 days.

They were election officials in the 1970 precinct of the 1st ward in the City of Chicago at the judicial election held June 3, 1962, and were charged with violating provisions of the Illinois Election Code, Chapter 10, Section 1-1, which provided that election officials were to be present and contain a record of names of voters to be present and filed, and ballots cast in the name of each voter. On the trial respondents moved for a judgment of acquittal on the ground that the trial judge was a candidate for reelection at the succeeding November election. As held by us in People v. Marsh, 1962, 101 Ill. 2d 401, opinion filed January 2, 1963, the court did not err in denying this motion.

The evidence shows that Brown, Kilgus and Cassella were judges of election, and Frank Cassella a clerk. The remaining election officials were not apprehended. Brown served as the judge at the ballot box, instructing ballots and delivering them to voters after the approval of the voters' applications by the remaining judges. The two sick about 11 o'clock a.m. and absented herself until 3:30 p.m. when she returned and filed applications of voters until the close of the election.

2.

Kilburg had served as an election official four times before the election involved herein. Until Brown left the polling place on account of illness Kilburg worked on both binders, comparing the signatures on the applications with those on the permanent registration cards. She took Brown's place when the latter left the polling place and continued initialing ballots and working at the ballot box until the close of election. Her initials or name appears on all except one of the voters' applications, approving or okaying the applicants' right to vote. She explains this by saying that the absent judge, Lorena Davis, neglected to sign the applications - a fact not discovered until near the end of the day - and that she, Kilburg, thought she had the right as a judge to initial the blank applications, and did so. Casella merely handed applications to the voters and did not sign or initial any of them. Each of the respondents denies any guilty knowledge or participation in any wrong doing.

A handwriting expert, whose qualifications are admitted, testified, after comparing the signatures on the applications with the permanent registration cards, that more than 50 signatures were forged. Eight witnesses testified that they did not vote and did not sign the applications purporting to bear their signatures. Another witness was uncertain as to whether he had voted or signed his name. As to four of the witnesses - the number of whose applications appear in the record before us - the expert declared the signatures on the applications to be forgeries. Each of these applications bears the endorsement or approval of Kilburg, and she testified that three of the voters had actually voted. Neither the permanent registration cards nor the voters' applications, or photostatic copies of either, are before us. We must therefore assume that the evidence supported a finding that the applications held to be forgeries by the handwriting expert were in fact forged. There being no

Alimony had served as an election official two times before  
 the election involved herein. While never left the position  
 place on account of illness Alimony worked on both elections,  
 conducting the registration on the registration with Alimony as  
 the permanent registration officer. The last election was in  
 when the latter left the office of Alimony and continued his  
 position and worked as the chief of the election office in  
 election. His initials on the returns were "A. Alimony" and  
 the voters' applications, approving on people the registration  
 right to vote. The explanation of saying that he should  
 judge, having been, registered to vote the registration - a fact  
 not discovered until after the day of the election - was that  
 Alimony, himself, had the right as a judge to initial the  
 blank applications, and did so. The registration officer  
 filed to the voters and did not sign his initials on the  
 each of the registration forms any quality evidence on return-  
 out in any way being.  
 A. Alimony, after receiving the returns of the election,  
 certified, after receiving the returns of the election,  
 with the permanent registration officer, that the returns  
 signatures were correct. The registration officer then filed the  
 not vote and the day the election was held in the  
 their signatures. Another witness was necessary to the return  
 he had voted on Alimony's return. As is true of the registration  
 the number of votes registered - as is the case of the registration  
 the exact number of votes registered in the registration as the  
 returns. Each of the registration returns have the same number of  
 removal of Alimony, and the certified that none of the voters  
 had actually voted. Within the permanent registration officer  
 for the voters' applications, or registration officer, Alimony,  
 are before us. We must therefore assume that the voters  
 supported a finding that the registration had in the returns  
 by the handwriting experts were in fact correct. There being no

3.

evidence in the record that Brown or Casella had anything to do with the comparison of signatures and the approval of the voters' applications, there is no evidence of their connection with the offense charged. Peo. ex rel. Rusch v. Fusco, 397 Ill. 468. In addition to the testimony of the handwriting expert involving Kilburg, her testimony is contradicted by the testimony of the three witnesses whom she claims actually voted at the election. We cannot hold that the finding of the trial court as to her is against the manifest weight of the evidence. The punishment is not excessive.

It appeared that on opening the ballot box after the close of the polls it was found to contain 10 more ballots than were actually cast. No explanation is given as to how these extra ballots came to be in the ballot box. The election officials followed the statute by withdrawing 10 ballots selected at random. None of the respondents can be said to be knowingly guilty of misconduct in respect to these ballots.

The judgment is affirmed as to the respondent Kilburg and reversed as to Brown and Casella.

Affirmed as to Kilburg;  
Reversed as to Brown and Casella.

Feinberg and O'Connor, JJ., concur.

[illegible]

1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591, 2592, 2593, 2594, 2595, 2596, 2597, 2598, 2599, 2600, 2601, 2602, 2603, 2604, 2605, 2606, 2607, 2608, 2609, 2610, 2611, 2612, 2613, 2614, 2615, 2616, 2617, 2618, 2619, 2620, 2621, 26



44216

EMIL and MARJORIE FERRO,  
Appellants,

v.

JOHN P. DAROS,  
Appellee.

APPEAL FROM  
MUNICIPAL COURT  
OF CHICAGO.

3331A 886

MR. JUSTICE FEINBERG DELIVERED THE OPINION OF THE COURT.

Plaintiffs, the vendors, brought suit against defendant to recover \$650 deposited in escrow with defendant, a real estate broker, under a contract for the sale of a restaurant.

Defendant filed an answer admitting he was the escrowee under the contract; that he was the broker who negotiated the sale; that he procured the purchasers who not only signed the contract but were ready, willing and able to carry out all of the terms of the contract; that under the contract he was entitled to a commission of \$900; that plaintiffs failed and refused to comply with the terms of the contract, whereupon the purchasers elected to cancel their agreement and demanded the return of the \$650 deposited in escrow; that defendant was obliged to return said amount to the purchasers and thereby lost the commission through no fault of his own. With the answer was filed a counterclaim by defendant, seeking judgment for the full amount of the commission.

Plaintiffs filed an answer to the counterclaim, denying each of the allegations.

Defendant moved for summary judgment for \$900 and costs, and in support of the motion for summary judgment filed affidavits substantially setting up the facts set up in the original answer

EMIL AND MARJORIE FENLO,  
Appellants,

v.

JOHN F. DAVIS,  
Appellee.

APPEAL FROM  
CIRCUIT COURT  
OF CHICAGO.

38514-386

MR. JUSTICE KILPATRICK DELIVERED THE OPINION OF THE COURT.

Plaintiff, the venditor, brought suit against defendant

to recover \$850 deposited in escrow with defendant, a real

estate broker, under a contract for the sale of a restaurant.

Defendant filed an answer admitting he was the venditor

under the contract; that he was the broker who negotiated the

sale; that he procured the purchaser who not only signed the

contract but was ready, willing and able to carry out all of

the terms of the contract; that under the contract he was

entitled to a commission of \$800; that plaintiff failed and

refused to comply with the terms of the contract, whereupon

the purchaser elected to cancel their agreement and rescinded

the return of the \$850 deposited in escrow; that defendant was

obliged to return said amount to the purchaser and thereby lost

the commission through no fault of his own. With the answer

was filed a counterclaim by defendant, seeking judgment for

the full amount of the commission.

Plaintiff filed an answer to the counterclaim, denying

each of the allegations.

Defendant moved for summary judgment for \$800 and costs,

and in support of the motion for summary judgment filed affidavits

substantially setting up the facts set up in the original answer.

2.

to the plaintiffs' claim and the counterclaim filed by defendant, and more in detail alleged in these affidavits the failure of plaintiff to comply with the terms of the contract and escrow agreement.

Plaintiffs filed an affidavit in opposition to the motion for summary judgment, wherein they alleged that they had fully complied with the terms of the contract and the escrow agreement, and alleged that the defendant wrongfully returned the escrow deposit to the purchasers; that the defendant had full knowledge of the default of the purchasers and, notwithstanding such default, returned the escrow deposit and thereby deprived plaintiffs of the amount. The affidavit further set up that although demand was made upon the purchasers to carry out their contract, they refused to do so; that under the agreement between plaintiffs and defendant, as a broker, defendant was not entitled to the commission until the complete consummation of the contract of purchase.

Upon a hearing of the motion for summary judgment, the court entered a summary judgment on the counterclaim for \$250 and costs, from which judgment plaintiffs appeal.

Defendant in his brief says: "Judgment for \$250.00 was entered in favor of defendant-counterclaimant and against plaintiffs, that sum being the difference between the \$900.00 commission due said defendant-counterclaimant from said sellers and the \$650.00 deposit which he surrendered to the buyers, and the cause was continued for trial for a jury to determine whether the sellers, plaintiffs herein or the buyers who are not parties to this cause were guilty of failure to perform the contract".

If the affidavit in opposition to the motion for summary judgment presented an issue of fact, then the court had no right to enter a summary judgment but was obliged under the law to try the controverted issue. Macks v. Macks, 329 Ill. App.

to the plaintiffs' claim and the counterclaim filed by defendant, and more in detail alleged in these affidavits the failure of plaintiff to comply with the terms of the contract and escrow agreement.

Plaintiffs filed an affidavit in opposition to the motion for summary judgment, wherein they alleged that they had fully complied with the terms of the contract and the escrow agreement, and alleged that the defendant wrongfully returned the escrow deposit to the purchaser; that the defendant had full knowledge of the default of the purchaser and, notwithstanding such default, returned the escrow deposit and thereby deprived plaintiffs of the amount. The affidavit further set up that although demand was made upon the purchaser to carry out their contract, they refused to do so; that under the agreement between plaintiffs and defendant, as a buyer, defendant was not entitled to the completion until the completion of the contract of purchase.

Upon a hearing of the motion for summary judgment, the court entered a summary judgment on the counterclaim for the amount of \$200.00, from which judgment plaintiffs appeal. Defendant in his brief says: "Judgment for \$200.00 was entered in favor of defendant-counterclaimant and against plaintiffs, that sum being the difference between the \$200.00 commission due said defendant-counterclaimant from said buyers and the \$200.00 deposit which he advanced to the buyers, and the cause was continued for trial for a jury to determine whether the sellers, plaintiffs herein or the buyers who are not parties to this cause were guilty of failure to perform the contract."

If the affidavit in opposition to the motion for summary judgment presented an issue of fact, then the court had no right to enter a summary judgment but was obliged under the law to try the controverted issue. Wicks v. Wicks, 200 Ill. App.

3.

144; Barkhausen v. Naugher, 395 Ill. 562. The defense to the counterclaim and to the motion for summary judgment presented a question of fact as to the right of defendant broker to recover any commission, and the court could not allow a summary judgment for a portion.

For the reasons indicated, the judgment of the Municipal Court is reversed.

JUDGMENT REVERSED.

Niemeyer, P. J., and O'Connor, J., concur.



144; Bartholomew v. Haverley, 335 Ill. 523. The referee is not competent to make a summary judgment and to the motion for summary judgment is a question of fact as to the right of defendant to recover any commission, and the court would not make a summary judgment for a portion.

For the reasons indicated, the judgment of the appellate court is reversed.

REVEREND JUSTICE.

WHEATLEY, J., and O'CONNOR, J., concur.

44036

PEOPLE OF THE STATE OF ILLINOIS,  
ex rel. HENRY E. MARSKI,  
Appellee,

v.

EUGENE SPIKES, MARION YSLAS,  
THELMA SMITH, AGNES LEWIS, and  
SHIRLEY BERKOWITZ,  
Appellants.

APPEAL FROM COUNTY COURT  
OF COOK COUNTY.

3331A.3371

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

At the judicial election held June 3, 1946, Eugene Spikes, Thelma Smith and Agnes Lewis were judges of election in the 47th Precinct of the 20th ward of Chicago, and Marion Yslas and Shirley Berkowitz were clerks of election. They were each charged with misconduct and misbehavior in the performance of their duties in that they "permitted applications to be presented and filed and ballots to be cast in the names of persons who did not personally appear at the polling place and vote in said election, and permitted applications containing forged signatures of voters to be presented and filed and ballots to be cast in their names, and made a false canvass and return of the votes cast." Each of the defendants denied they had committed any offense. After a hearing the court found each of the defendants guilty of contempt of court and sentenced them to be committed in the county jail-Eugene Spikes for a period of six months, Thelma Smith for three months, Agnes Lewis for three months, Marion Yslas for two months, and Shirley Berkowitz for two months. To reverse the judgment the defendants prosecute this appeal. For the purpose of this opinion we shall refer to the petitioner as plaintiff and the judges and clerks of election as defendants.

The defendants filed a verified petition to transfer the cause to some other judge, in which they set up that they

v

[illegible]

At the subject's residence on 10/10/68, the following items were found:

in the 47th President of the 40th year of Chicago, and before  
Spikes, Thelma Smith and James Smith were 1900 of Chicago

[illegible]

REPRODUCTION OF THIS DOCUMENT IS PROHIBITED

to be provided and filed and

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and vote in said election, and

1. The following information is being furnished to you for your information:

ballots to be cast in their names, and when a full list of names

...and to winter birds

They had committed any offense. After a hearing the court

found each of the defendants guilty of conspiracy to commit

sentenced them to be confined in the county jail -

10-10-68

James Lewis for three months. Let's see what we can do.

Shirley Berkowitz for two months. In return for this

the defendant's presence. For the purpose of this

and has been permitted to remain in the area for the purpose of the investigation.

Students and clerks at election

The defendants filed a verified petition for writ of habeas corpus.

2,

feared they would not receive a fair and impartial trial before the judge of the County Court for the reason that the judge was then a candidate for re-election in the election to be held in November, 1946, and by reason thereof he might unintentionally be directed toward attaining public favor. The court refused to transfer the case to another judge. In this we think there was no error. The judge had been nominated in the April primaries of 1946 and was not a candidate at the election held June 3, 1946 which is the one involved in the instant case.

In People ex rel. Marski v. Belvedere et al., No. 44012 (opinion filed January 5, 1948), which was a proceeding similar to the one at bar, we passed on this same question adversely to the contention now made by the defendants.

On the hearing the records of the election commissioners were introduced in evidence by agreement of the parties. Counsel for defendants say the plaintiff then called twenty-two voters of the precinct, fifteen of whom testified they signed an application for a ballot, four that they did not sign the applications for ballots on which their names appeared. Eight voters shown by the records of the election commissioners as having voted testified that they did not vote. One of them testified that she signed her name on an application on the street. Another of the eight testified that she signed her application at home. Three of them testified that they did not receive any ballot. Another one of the eight swore that he did not ask for any ballot and did not mark one. Another could not recall whether he voted that day. Another testified that she went into the booth but the ballots (judicial and proposition) were already marked. The remaining fourteen voters testified that they voted at the election.

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Judge was then a candidate for re-election in the election

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The court refused to transfer the case to another Judge. It

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in the April primaries of 1944 and was not a candidate of any

election held June 3, 1946 which is the one involved in the

instant case.

In People ex rel. Murray v. Salvadore et al., No. 40011

(opinion filed January 3, 1946), which was a proceeding similar

to the one at bar, we passed on this same question adversely

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recall whether he voted that day. Another testified that the

went into the booth but he pulled out (judicial and prosecutive)

were already marked. The remaining fourteen voters testified

that they voted at the election.



3.

Plaintiff called Rudolph Salmon who testified as a handwriting expert. He examined all the applications for ballots of the precinct, compared the signatures on the applications with the corresponding names on the registration cards in the binder, and testified that in his opinion twelve of the applications were not written by the registered voter.

Defendant Eugene Spikes testified that he served as Republican judge, that he initialed all the ballots and worked at the ballot box until the polls closed, after which he sorted and helped count them; that 218 ballots were cast; that there were four different ballots given each voter (one of which was the judicial ballot, and the other three being proposition ballots). Spikes testified that everyone who received a ballot that day went into the booth and afterwards the ballots were put into the ballot box. He then testified as to particular persons who came in that day to vote, some of whom had testified they had not voted, etc. His testimony further tends to show that he was well acquainted with most of the voters in the precinct, and that almost all of the voters whose votes had been questioned by the witnesses produced by plaintiff had properly voted.

Agnes Lewis testified that she had lived at her present address in the precinct for about twelve years; that she went "to twelfth grade, two semesters in junior college at Hesper"; that she was a special power machine operator; that she arrived at the polling place about five minutes to six on the morning of the election, "lighted the candles"; that defendant Spikes asked a young lady (Thelma Smith), who came in, to serve as a judge because one of the judges had not appeared, and that she acted as a judge. Continuing, the witness testified that she checked signatures of the persons who applied for ballots, and printed their names underneath where the applicant signed, and

The plaintiff called Rudolph Babin who testified as a handwriting expert. He examined all the applications for

ballots of the precinct, compared the signatures on the applications with the corresponding names on the registration cards in the binder, and testified that in his opinion a large number of the applications were not written by the registered voter. Defendant Eugene Spikes testified that he arrived at

Republican Judge, that he installed all the ballots and worked at the ballot box until the polls closed, after which he sorted and helped count them; that 216 ballots were cast; that there were four different ballots given each voter (one of which was the judicial ballot, and the other three being

proposition ballots). Spikes testified that everyone who received a ballot that day went into the booth and returned the ballots were put into the ballot box. He then testified as to particular persons who came in that day to vote, and of whom had testified they had not voted, etc. His testimony

further tends to show that he was well acquainted with most of the voters in the precinct, and that almost all of the voters whose votes had been questioned by the witnesses, had voted. Plaintiff had properly voted.

Agnes Lewis testified that she had lived at her present address in the precinct for about twelve years; that she went "to twelfth grade, two semesters in junior college at night"; that she was a manual power machine operator; that she arrived at the polling place about five minutes to six on the morning of the election, "lighted the candles"; that defendant Spikes called a young lady (Thelma Smith), who came in, to serve as a judge because one of the judges had not appeared, and that she acted as a judge. Continuing, the witness testified that she checked signatures of the persons who applied for ballots, and printed their names underneath where the applicant signed, and

4.

then told Mr. Spikes the voter was entitled to a ballot. She further testified concerning certain other persons whose right to vote had been questioned by plaintiff, and in most instances her testimony was that everything was regular and that the people voted whose names appeared as having done so. From her testimony it further appeared that she was well acquainted with the voters of the precinct, knew a great many of them personally, and the evidence shows that she checked nearly all of the applications in the trial court; that she thought she had performed her duty; "I saw to it that everybody who came in signed their own application and they voted and then went out. I had no intention or desire to violate the election law, if there are any irregularities, they are mistakes. I don't know of any, but we all make mistakes."

Defendant Marion Yslas, clerk, testified that she went to the polling place in the morning to vote; that Mr. Spikes said: "You are to serve. You work or go to jail. The Board isn't filled up." She was then sworn in as a clerk; that she did not know in the morning before the time she was sworn in that she was to work at the polls; that she printed voters' names on the applications below the voter's written signature practically all day; and that all of the voters stated that they lived in the precinct.

Defendant Thelma Smith testified that she was doing maid-service work at the Morrison Hotel; that about 6:30 on the morning of the election she was sworn in as a substitute judge; that after the voters signed their applications she looked at the name in the binder and O.K.'d their signatures; that every one of the 218 people who came to the voting place signed their

then told Mr. Spikes the voter was entitled to a ballot. She further testified concerning certain other persons whose right to vote had been questioned by Plaintiff, and in some instances her testimony was that everything was regular and that the people voted whose names appeared on Davis' vote list. From her testimony it further appeared that she was acquainted with the voters at the precinct, knew a great many of them personally, and the evidence shows that she checked nearly all of the qualifications in the official count; that she thought she had performed her duty; "I am so sure that everybody who came in signed their own qualification and they voted and went out. I had no intention or desire to violate the election law, if there are any irregularities, they are mistakes. I don't know of any, but we all make mistakes."

Defendant Marion Yelms, clerk, testified that she went to the polling place in the morning to vote; that Mr. Spikes said: "You are to serve. You work on it to tell. The board isn't filled up." She was then sworn in as a clerk; that she did not know in the morning before the time she was sworn in that she was to work at the polls; that she printed voters' names on the applications below the voters' written signature practically all day; and that all of the voters stated that they lived in the precinct.

Defendant Thelma Smith testified that she was doing maid-service work at the Morrison Hotel; that about 8:30 on the morning of the election she was sworn in as a substitute judge; that after the voters signed their qualifications she looked at the names in the binder and O.K.'d their signatures; that every one of the 218 people who came to the voting place signed their



5.

name to the application blank and received ballots; and that she knew of nothing that was irregular.

Defendant Shirley Berkowitz testified that she had lived with her mother at 1342 South Halsted Street for seventeen years; that she served as a clerk of election; that she issued applications to voters and worked all day.

Each of the defendants testified that they had never been accused of any offense.

In People v. Fusco, 397 Ill. 468, at 470, the court said: "We have repeatedly held that a contempt proceeding under said section 14-5 is a proceeding for civil contempt \* \* \*. It has been held many times that in a charge for civil contempt the respondents must be shown guilty by at least a preponderance of the evidence."

Counsel for defendants contend that plaintiff did not sustain the burden of proving defendants guilty "by either the preponderance of or the most convincing evidence." We have considered all the evidence in the record, and are of opinion that we would not be warranted in disturbing the finding of the trial judge who saw and heard the witnesses testify, as to the defendants Eugene Spikes and Agnes Lewis. We have above referred to the testimony of these two witnesses and are of opinion that they had more to do at the polls on the day in question and knew more people in the precinct than the other three defendants.

As to the defendants Marion Yslas, Thelma Smith and Shirley Berkowitz, we think the finding and judgment is against the manifest weight of the evidence. The evidence shows, as above stated, that they checked the signatures on the applications they had handed to the prospective voters with the signatures in the binders.

The judgment of the County Court of Cook County as to the defendants Eugene Spikes and Agnes Lewis is affirmed.





6.

As to defendants Marion Yelas, Thelma Smith and Shirley Berkowitz the judgment is reversed.

JUDGMENT AFFIRMED AS TO TWO DEFENDANTS  
AND REVERSED AS TO THREE DEFENDANTS.

Niemeyer, P. J., and Feinberg, J., concur.

As to defendants Marion Yelton, Thelma Smith and Cora

Herzowitz the judgment is reversed.

JUDGMENT AFFIRMED AS TO THE DEFENDANTS  
AND REVERSED AS TO THOSE WHOSE NAMES

Wiemeyer, P. J., and Weinberg, J., concur.

44200

GERTRUDE FISCHER, (Turek)  
Appellant,

v.

EDWARD FISCHER,  
Appellee.

APPEAL FROM  
SUPERIOR COURT,  
COOK COUNTY.

353-297

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Plaintiff obtained a decree of divorce from defendant December 13, 1939. Afterwards she married Mr. Turek, and a number of times afterwards filed petitions seeking to compel the payment of what plaintiff claimed was due for the support of their minor child. September 20, 1946, the court entered an order on motion of attorney for the petitioner plaintiff, ordering the respondent, Edward Fischer, to pay to the plaintiff, now Gertrude Turek, forthwith, \$500, on account of arrears and delinquencies on previous orders, for their minor child's support. That defendant admitted he was behind in the payment of \$1,000, but that petitioner claims he was in arrears \$1,961, and it was further ordered that the support of the minor child, Barbara Dale Fischer, be terminated as of September 4, 1946, and that respondent pay \$40 per month to the petitioner commencing October 20, 1946, to apply on the balance of the amount still due from him. Defendant paid \$500 as ordered. The matter was referred to Master in Chancery Wescott to determine the amount respondent was in arrears and to report the same to the court. The master took the evidence, made up his report in which he stated "That a stenographic record of the proceedings was not taken and that I made minutes of the testimony." He made a number of findings in which he found that in plaintiff's first petition, filed February 3, 1945, she claimed he was \$250 in arrears and

GEORGE FISHMAN (Plaintiff)  
 Defendant

-v-

EDWARD FISHMAN  
 Appellee

STATE OF  
 SUMMIT COUNTY  
 COURT HOUSE

IN JUDICIAL DISTRICT OF THE COUNTY OF SUMMIT

Plaintiff obtained a decree of divorce from defendant December 12, 1934. Afterward she married Mr. Fishman and a number of times afterwards filed petitions seeking to compel the payment of what plaintiff claimed was due for the support of their minor child. Defendant, December 21, 1945, the court entered an order on motion of attorney for the plaintiff, ordering the respondent, Edward Fishman, to pay to the plaintiff, now Gertrude Fishman, \$100.00, on account of arrears and delinquencies on previous orders, for support of minor child's support. That defendant admitted he was owing in the payment of \$7,000, but that petitioner claimed he was in arrears \$1,981, and it was further ordered that the amount of the minor child, Edward Dale Fishman, be permitted as of September 4, 1945, and that respondent pay 40 per cent of the petitioner concerning October 21, 1945, to apply on the balance of the amount still due from him. Defendant paid \$100 as ordered. The matter was referred to master in summary record to determine the amount respondent was in arrears and to report the same to the court. The master took the evidence made up his report in which he stated "That a transcript of the proceedings was not taken and that I read minutes of the testimony." He made a number of findings in which he found that in plaintiff's first petition, filed February 2, 1945, she claimed he was \$250 in arrears and



2.

furnished an itemized list which showed \$340.25, and that there were other discrepancies in three other petitions which she later filed. He found that defendant was \$804 in arrears and he was ordered to pay this in installments of \$40 per month.

Objections were filed and overruled, they stood as exceptions which were overruled and an order was entered April 25, 1947, sustaining the master's report. Plaintiff appeals.

Plaintiff's contention is that the total amount due was \$1,290.25, and that the court should have found this to be the fact. Her counsel contends that "the Master's report and recommendations being contrary to the law and against the manifest weight of the evidence" and that the order should be reversed and counsel argue as though the evidence was before us. Since the evidence is not preserved in the record and is not preserved before the master, under the law, it is obvious that we would not be warranted in disturbing the finding of the master, approved as it was by the chancellor on the ground that it is against the manifest weight of the evidence.

We have examined the master's report and find that he went into the matter very carefully and upon a consideration of the entire record, we are clearly of opinion that the order appealed from must be affirmed.

ORDER AFFIRMED.

Niemeyer, P. J., and Feinberg, J., concur.

furnished an itemized list which showed \$14.00, and that there were other discrepancies in favor of other witnesses which were later filed. He found that defendant was not in company with him was ordered to pay this in satisfaction of \$10 per month.

Objectives were filed and overruled, that there be exceptions which were overruled and an order was entered April 25, 1947, sustaining the master's report. Plaintiff appealed.

Plaintiff's contention is that the total was \$1,500.00, and that the court should have found that to be the fact. The court's opinion is that the master's report and recommendations being contrary to the law and against the manifest weight of the evidence, the court should have reversed and corrected errors in finding the evidence was correct. The evidence is not controverted in the record and is not preserved before the court, under the law, it is obvious that we could not be surprised in finding the finding of the master, approved as it was by two channels of the Grand Jury, that it is against the manifest weight of the evidence. We have examined the master's report and find that it is in the matter very carefully and with a consideration of the entire record, as the object of finding the evidence appealed from must be affirmed.

Given in Court.

Witness, J. J. and John, J. J. Jones.

IN THE  
APPELLATE COURT OF THE  
SECOND DISTRICT OF ILLINOIS

TO THE OCTOBER TERM, A. D. 1947.

OLLIE E. JONES, CLARENCE WEBB,  
JAMES WEBB and ELMER MARTIN,  
Plaintiffs-Appellees

vs.

WILLIAM RIPLEY and ALMA RIPLEY,  
Defendants-Appellants.

Appeal from  
Circuit Court of  
Iroquois County.

WOLFE,-- P. J.

Ollie E. Jones was the owner of over three hundred acres of land in Iroquois County, known as Brookfield Farm. He entered into a lease with Clarence Webb and James Webb for one portion of this land and Elmer Martin the other. William Ripley and Alma Ripley had been farming the land for the past five or six years. A misunderstanding between Jones and Ripley caused Jones to terminate what he called a partnership between himself and the Ripleys. Jones and the Webbs and Martin started a suit in the Circuit Court of Iroquois County, asking that the Court terminate the partnership, and for an accounting between Jones and the Ripleys, and for an injunction against Ripley and his wife, restraining them from interfering with the Webbs and Martins, as tenants for the farm during the crop season of 1946.









The complaint filed, set forth the history of the business relations between Jones and the Ripleys; how the profits should be divided; that Jones should furnish the machinery; that William Ripley was to do the farm work, and pay a monthly rental for the home, and four acres on the farm. Jones contended that the agreement was a partnership, and that the partnership business had been fully settled, but Ripley refused to give possession of the farm.

William Ripley filed an answer and admitted most of the facts relative to how the farm had been managed, how the profits had been divided, but denied that there was a partnership agreement between the parties, and claimed the agreement was one as landlord and tenant; that he had rented the farm from year to year, and had received no written notice from Jones, the owner, to terminate the tenancy, so he was rightfully in possession of the same, and intended to farm it for the crop year of 1946.

Ripley also filed a cross complaint setting forth many of the facts, as stated in his answer, and claimed that Jones was indebted to him to a large amount, and asked that the Court declare that he was in the rightful possession of the premises, and that Jones account for what he owed him. To the counterclaim, Jones filed a reply, in which he denied that the relationship of landlord and tenant had existed, but reasserted that it was a partnership, and that the partnership had been fully terminated. He also denied that he was indebted to Ripley for any amount, but if the Court found that he owed Ripley anything, he would pay it.

During the pendency of the suit, the plaintiffs made a motion for a temporary receiver, alleging that there were many noxious weeds going to seed on the premises, which would cause much damage to proper farming for the 1947 season; that the premises





in question were being damaged, and the litigation in this suit cannot be determined in time to prevent a loss. A temporary receiver was appointed to take charge of the property.

The case was submitted to the Court without a jury, who after hearing the evidence, found the issues in favor of the plaintiffs, and that the relationship that existed between the parties was that of a partnership, and that said partnership agreement had been terminated by the parties on Feb. 23, 1946. A decree was entered accordingly. William Ripley has appealed from this decree.

Plaintiffs' exhibits No. 1 to 9 inclusively, were all executed on February 23, 1946. No. 1 provides: "Agreement between O. E. Jones & Wm. Ripley. For full payment for all labor, carpenter and otherwise O. E. Jones surrenders full title to the following farm implements." Then is listed the farm implements in question. No. 2. "Wm. Ripley agrees to sell 48 head of hogs, more or less week ending March 2nd 1946 dividing proceeds equally between himself and O. E. Jones." No. 3. "Agreement between Wm. Ripley and O. E. Jones. This agreement gives permission to Elmer Martin and or Lawton Justice and or C. H. Webb, and or James Webb or any one the choose to trespass Brookfield Farm effective March 2nd 1946." No. 4. "Wm. Ripley agrees to sell two cows, one heifer calf, paying O. E. Jones 475.53 and dividing any over this equally. If these three do not sell for above price the entire price received will be paid O. E. Jones. To be sold on or before March 2nd 1946." No. 5. "All oats, soybeans and corn will be delivered Braden & Boughton Elevator Wellington, Ill., and sold at market price, proceeds divided equally." No. 6. "Wm. Ripley agrees to vacate house on or before March 30th and if unable to locate living

for questions and answers, and the following is the  
answer to the question as to how to handle the  
value of the property in the case of the estate.

The law is not clear as to how to handle the  
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value of the property in the case of the estate.

quarters he will have privilege of storing his household effects in house until April 30th." No. 7. "Wm. Ripley agrees to sell all hay and straw on Brookfield Farm on or before March 9th dividing proceeds equally between himself and O. E. Jones." No. 8. "This is receipt for cancellation of note for \$2500.00 dated 3/17/45 due 11/1/45 held by Wellington State Bank. Made out to O. E. Jones. Note signed by Wm. Ripley and Alma Ripley." No. 9. "When all agreements are fulfilled as agreed on statements signed by O. E. Jones and Wm. Ripley witnesses by M. F. Merritt known as Exhibits one - two - three - four - five - six - seven - and eight dated 2/23/46. There then exists no obligations by or between either party."

Rueben L. Craig was called as a witness and his evidence as abstracted, shows the following: "Ripley told me that he was through out at Brookfield farm and that he was leaving the farm; said he had had a settlement with Mr. Jones, wound up his affairs with Mr. Jones and he thought he had a very good settlement, think he said he was through with the farm and expected to move immediately; said he was going to see Standard Oil Company, about salesmanship. Merchandise Standard Oil; talked about opening an oil station in Hoopeston. As to anything else said, no, but that it was satisfactory and that he was leaving." James L. Conken testified that he was in the restaurant business in Hoopeston, and had known Ripley for five or six years; that he had talked with Ripley about March first, this year, concerning Brookfield Farm. Ripley said, "He was all settled up, leaving the farm, and was going with Standard Oil Company at Peoria, or open a Shell Station at Hoopeston."





5.

From the evidence in this case, both oral and documentary, it is our conclusion that the Court properly found that there was a partnership agreement existing between the plaintiff, Jones, and the defendant, William Ripley, and that the same had been terminated by the parties, and that Jones was entitled to the possession of the farm.

It is argued by the appellant that the Court did not have jurisdiction to try this suit, and sign the orders that he did, because it was purely a suit for possession of the farm, and not an equitable action. The appellant is in no position to raise this question, as it was not raised in the trial Court, but he filed an answer and cross complaint and asking for the same relief in his cross complaint, as the plaintiff had asked in the original complaint. However, we are of the opinion that the Court did have jurisdiction of the parties and the subject-matter of the suit, and we find no merit in this contention. The decree appealed from is affirmed.

Decree affirmed.

Hewitt dissent.

from the evidence in this case, that the defendant  
 did not intend to kill the victim, but that he  
 did intend to cause him serious bodily injury.  
 The defendant's intention to cause serious bodily  
 injury to the victim is a necessary element of the  
 crime of assault with a dangerous weapon, and the  
 evidence in this case is sufficient to establish  
 that the defendant had such an intention.

It is a well established principle of law that  
 the intent of a defendant is to be determined from  
 the facts and circumstances surrounding the crime.  
 In this case, the facts and circumstances are  
 as follows: The defendant was armed with a  
 dangerous weapon, and he used it to threaten  
 the victim. The defendant's words and actions  
 were such as to cause the victim to believe that  
 the defendant intended to use the weapon against  
 him. The defendant's intention to cause serious  
 bodily injury to the victim is a necessary  
 element of the crime of assault with a dangerous  
 weapon, and the evidence in this case is  
 sufficient to establish that the defendant had  
 such an intention.

Very truly yours,

John Doe

Geneva A. Miller filed a complaint in the Circuit Court of Kankakee County, against the defendant, Robert H. Miller, her husband, asking for a divorce and charging him with extreme and repeated cruelty, and with cursing her and calling her vile and obscene names, and that many times he had threatened her with personal violence. At the time of filing her complaint for divorce, the Court issued an injunction restraining the defendant from interfering in any way with his wife, or from selling, or disposing of his property. She asked for the custody of their minor child, a boy fifteen years of age, also for permanent alimony.



On Feb. 3, 1947, the defendant filed his answer, in which he admitted the marriage of the parties, and the birth of the son, but denied any and all allegations of mistreatment on his part. The defendant filed a counterclaim charging his wife with extreme and repeated cruelty, and asked for a divorce from her.

On April 16, 1947, the plaintiff amended her complaint by charging, "that, for several years last past, the defendant had habitually absented himself from his home during the evenings, and on occasions, remained away from the home throughout the night; that during said times, and in the evening he had kept company, and had been seen in public places with a married woman other than the plaintiff, and that the plaintiff, for the reasons herewith set forth, is therefore now living separate and apart from the defendant without her fault." The amendment also changed the suit from divorce to one of separate maintenance. The defendant did not answer this amendment. The case was heard before the Court without a jury, who found against the plaintiff in her suit for separate maintenance, and against the defendant on his cross-complaint for a divorce. The plaintiff, Geneva A. Miller, has perfected an appeal to this Court.

The plaintiff testified that on several different occasions, the defendant had struck her violent blows, one time injuring her back so that it was necessary for her to have treatment for the same; that one time he hit her with his shoe, and that on many many occasions he had cursed her, and used the vilest of epithets toward her. The plaintiff also testified that her husband had frequently gone out with other women; that she had seen him with





them, and on one occasion, she, her mother and a friend, Jessie Ridgeway, were in their car, and followed the defendant from Kankakee to Momence, Illinois; that they saw the defendant, in the car ahead of them, with a woman; that he was hugging and kissing the woman. Mrs. Ridgeway was called as a witness to corroborate this part of the plaintiff's testimony, but refused to tell what she saw the parties doing in the automobile.

Mrs. Alta Yeates, the mother of the plaintiff, lived at the home of the Miller's. She testified that the defendant and plaintiff had numerous quarrels; that she saw the defendant strike her daughter twice; that she had heard him strike her at other times, and that she had threatened to call the police if he did not desist. On another occasion, she saw the defendant strike the plaintiff in the face two times. At one time the defendant hit the plaintiff on the back, and she had to go to a Miss Johnson, (chiropractor,) to have it straightened out; that she did not see the defendant strike the plaintiff with his shoe, but she saw the shoe fall on the floor, and later, the plaintiff had a black mark on her leg; that she had seen the defendant in the home when he was drunk; that she had heard the defendant swear at the plaintiff many times; that he frequently called his wife a 'son of a bitch,' and 'bitch;' that he did this in the presence of their son; that she had never heard the plaintiff call the defendant any names, and that she had never seen her strike the defendant; that she and the son of the parties went out to the garage about midnight one night when the plaintiff and the defendant were arguing about the car; that the son prevented his father from striking his mother. She also testified that she was with her daughter and Mrs. Ridgeway following the

thing, and on one occasion, the two women and a third, I believe,  
 highway, went to their car, and I believe the two women  
 returned to someone, I believe, I believe, I believe, I believe,  
 the car came to them, with a woman, and I believe, I believe,  
 giving the woman, I believe, I believe, I believe, I believe,  
 something, I believe, I believe, I believe, I believe, I believe,  
 to tell me, and I believe, I believe, I believe, I believe,  
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 and the defendant, I believe, I believe, I believe, I believe,  
 voices, I believe, I believe, I believe, I believe, I believe,  
 that she was with her father and her mother, I believe, I believe,

defendant, and the lady in the car, and she saw the defendant hugging and kissing the lady in the car.

Paul Miller, the son, who is fifteen years of age, testified that he never saw his father strike his mother, but had seen him when he was going to do so; that one time his grandmother got him out of bed, and they went out to the garage, and he stood between his father and mother, because his father was going to strike his mother; that the father was drinking that night, and he was mean when he was drinking; that his father frequently would call his mother a 'son of a bitch,' and a prostitute; that he would swear frequently when he was at home; that he had never heard his mother swear at his father, and she never threatened him; that he never saw anything about his mother's conduct, which he thought was wrong; that when his father was at home, he bought him things that he needed, and he never refused to buy anything which he asked him for. The son stated that he wanted to make his home with his mother.

The defendant testified in his own behalf, and denied ever striking his wife, except once, and that, he claimed, was in self-defense. He admitted that he did strike her with his shoe. He related occasions where he and his wife had had violent arguments, and claimed that she struck him with some keys and scratched the side of his face, and threw a paperweight at him; that she tried to hit him with an inkbottle, and he hit her with a shoe to stop her. He also testified that when he was a young man, the doctor advised him to drink moderately for his health; that he would drink whiskey when he could get it, as he had a blood condition; that he had drunk moderately since that time; that he could probably drink six, seven or eight beers without ill effect; that the plaintiff had always objected to his drinking;





that he had never been actually intoxicated in his life. "I have been sick twice. One time was on New Year's in 1942, but I came home under my own power. I was sick, but not drunk." He also testified that he and his wife had many quarrels. It started about a week after they were married; that she falsely accused him of running around with other women, and a great many of their quarrels were over these false accusations. In regard to the trip from Kankakee to Momence, he stated that he knew that he was being followed, so he told the woman companion, "that he would give them something to look at; that he acted like he was putting his arm around her and kissing her, but he did not do so." He related other quarrels and incidents that caused the couple to drift farther and farther apart. He admitted cursing his wife, but claimed he was justified in doing it. In regard to the time that the trouble occurred in the garage, he stated he did not hit his wife, but she told their son to hit him. The plaintiff was recalled as a witness, and she denied that she had ever called her husband any obscene names, or used any obscene language toward him. The son, Paul, was called in rebuttal. He said that he had heard his father testify that his mother had told him to hit his father, but that statement was not true.

The husband claimed that his business as a marble dealer frequently required him to consult women, and that he was frequently seen in public with them. However, his explanation of the ride from Kankakee to Momence in the automobile with a woman, not his wife, and what happened on the road that night, does not seem like an ordinary business transaction. In the case of *Hill vs. Hill*, 238 Ill. App., Page 189, the evidence in that case was stronger



than in the present one. The Court there held that the wife was entitled to separate maintenance where her husband had consorted with other women. In the present case, the evidence of the misconduct of the husband with other women, taken alone, would probably not entitle the wife to maintain her suit for separate maintenance. However, the evidence preponderates in favor of the appellant, in that the husband had frequently struck his wife, cursed her and called her vile and vulgar names. Cruel treatment does not always consist of actual violence. There are words of false accusations that inflict deeper anguish than physical injuries to the person which are more enduring and lacerating to the wounded spirit of a gentle woman, than actual violence to the person, though severe. (Farnham, 73 Ill. Page 500.) The defendant admits that he has frequently cursed his wife, but tries to justify himself for so doing. The evidence does not sustain his explanation as to why he cursed her. Certainly a woman does not have to meekly bear the cursings and vile names which the record shows the appellee used toward his wife, prior to the filing of this suit.

That there was frequently, quarrelling and bickering back and forth between the husband and wife, is clearly established by the evidence. In the case of French vs. French, 302 Ill. Page 160, our Supreme Court, in discussing a case similar to the one before us, used this language: "It is true that incompatibility of disposition, slight moral obliquities, occasional ebullitions of passion or trivial difficulties will not justify separation, but where the husband pursues a persistent, unjustifiable and wrongful course of conduct toward his wife which will necessarily and inevitably render her life miserable and living with him as his wife unendurable, she is not bound to live and cohabit with him



as her husband, and living separate and apart from him under such circumstances is without her fault within the meaning of the statute. She has made substantially such charges in this bill, and specifically charges acts that naturally tend to make any dutiful and loving wife most miserable and life with her husband unendurable. (Johnson v. Johnson, 125 Ill. 510.) It is said in the case cited, that if the husband voluntarily does that which compels the wife to leave him or justifies her in so doing, the inference may be justly drawn that he intended to produce that result, on the familiar principle that sane men usually mean to produce those results which naturally and legitimately flow from their actions, and that if he so intended, her leaving him would be desertion on his part and not on the part of the wife. The conduct alleged by the complainant in her bill which she charges compelled her to leave defendant and that made her life miserable and unendurable took place during a long period before the separation and during an equally long period thereafter. Her bill, if proved, would entitle her to a decree for a separate maintenance."

The appellee insists that the record does not show that the parties to this suit were living separate and apart at the time the suit was started. He quotes several cases that sustain this contention. However, he overlooks a very material point, namely; that on April 16, 1947, the plaintiff amended her complaint by making an additional charge against her husband and then concludes, "that the plaintiff for the reason herein set forth is now living separate and apart from the defendant, without her fault." As before stated, the defendant did not see fit to deny the facts as set forth in the amendment to the original complaint. It is undisputed that at the time this amendment was filed





43961

RUBY R. KAK and ELEANOR  
GURGANUS,

Appellants,

v.

ARMOND BRESCIA and L. J.  
LAYDON,

Appellees.

92X  
APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

388 I.A. 643

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiffs, Ruby R. Kak and Eleanor Gurganus, brought suit against defendants, Armond Brescia and L. J. Laydon, to recover damages for personal injuries resulting from the collision of an automobile driven by the plaintiff Ruby R. Kak, in which Eleanor Gurganus was riding as a passenger, with a truck owned by the defendant Laydon and driven by Brescia. The jury returned separate verdicts finding the defendants not guilty, and judgment was entered on the verdicts, from which plaintiffs appeal.

The accident occurred late in the afternoon on May 8, 1943, at the intersection of New and Gregory streets in Blue Island, Illinois. It was daylight at the time, weather conditions were fair, and the streets, which were of average width, were dry. Gregory street runs north and south and intersects New street, which runs east and west. On the northwest corner of New and Gregory streets there is a large school building, built up to both sidewalk lines. On the southwest corner there is a home, the southeast corner is occupied by a church, and the northeast corner is vacant and unimproved. Gregory street is paved, as is New street to the west thereof, but to the east of Gregory street New street is an unpaved steep hill, sloping downward. Thus New street was, in a sense, a dead-end street at this point, but there was no barricade on the east side of Gregory street.

JOHN E. HAN and WILSON  
GURBANIAN

Defendants

v.

ARMED HARBOR and I. J.  
LAWSON

Appellants

STATE OF CALIFORNIA  
COUNTY OF SAN DIEGO

THE FOLLOWING JURORS WERE SWORN THE ORIGIN OF THE CASE

The Plaintiff, John E. Han and Wilson Gurbanian,

brought suit against defendants, Armed Harbor and I. J.

Lawson, to recover damages for personal injuries resulting

from the collision of an automobile driven by the Plaintiff

John E. Han, in which William Gurbanian was riding as a

passenger, with a truck owned by the defendant Lawson and

driven by Krescia. The jury returned separate verdicts

finding the defendants not guilty, and judgment was entered

on the verdicts, from which plaintiffs appeal.

The accident occurred late in the afternoon on May 5,

1943, at the intersection of New and Gregory streets in San

Diego, California. It was daylight at the time, weather con-

ditions were fair, and the streets, which were at average

width, were dry. Gregory street runs north and south and

intersects New street, which runs east and west. On the

northwest corner of New and Gregory streets there is a large

school building, built up to both sidewalk lines. On the

southeast corner there is a home, the southeast corner is

occupied by a church, and the northeast corner is vacant

and unimproved. Gregory street is paved, as is New street

to the west thereof, but to the east of Gregory street New

street is an unpaved steep hill, sloping downward. This New

street was, in a sense, a dead-end street at this point, but

there was no barricade on the east side of Gregory street.

New street east of Gregory street was seldom used, being just an embankment and a dirt road from there on. There were no stop signs at the intersection, but there was a stop sign on Gregory street about two blocks north of New street.

Mrs. Kak testified that on approaching Gregory street she reduced her speed to about five miles an hour, came to a complete stop at the intersection, and shifted gears into second speed in preparation for making a left turn into Gregory street. Before proceeding into Gregory street she looked both to the north and the south, and to the north she saw defendant's truck about a block away, traveling south on Gregory street in the middle of the road, at what appeared to be a "regular rate" of speed. She had just completed making her left-hand turn when her car was struck on the left side by the front of the southbound truck. As the result of the impact her car was carried to the southeast corner of the intersection, where it struck a post. The truck proceeded over the curb at the southwest corner. The speed of defendant's car was estimated by Mrs. Kak at about 40 miles an hour at the time of the collision.

Brescia testified that the accident happened shortly after 6:30 P.M. while he was driving Laydon's Blue Island News Agency truck in a southerly direction on the right side of Gregory street about four feet from the curb. He had entered Gregory street at Burr Oak street, which is four short blocks from New street, and was on his way to the Illinois Central Railroad station, which is about two blocks south of New street. He estimated his speed at between 20 to 25 miles an hour. When he was about ten to twelve feet north of the intersection of Gregory and New streets he first saw plaintiff's automobile, approximately 50 feet west of the



new street east of Gregory street was being made, being  
just an embankment and a dirt road type there on. There  
were no stop signs at the intersection, but there was a stop  
sign on Gregory street about two blocks north of the street.  
Mrs. [redacted] testified that on approaching Gregory street  
she reduced her speed to about five miles an hour, came to a  
complete stop at the intersection, and shifted gears into  
second speed in preparation for making a left turn into  
Gregory street. Before approaching into Gregory street she  
looked both to the north and the south, and as she looked she  
saw defendant's truck about a block away, traveling south on  
Gregory street in the middle of the road, and when she  
to be a "regular type" of truck. She had just completed  
making her left-hand turn when her car was struck on the  
left side by the front of the defendant's truck. As the  
result of the impact her car was carried on the northeast  
corner of the intersection, where it struck a pole. The  
truck proceeded over the curb on the northeast corner. The  
speed of defendant's car was estimated by Mrs. [redacted] at about  
40 miles an hour at the time of the collision.  
Mrs. [redacted] testified that the defendant's truck  
after 6:30 P. M. while he was driving toward the railroad  
crossing track in a southerly direction on the right side  
of Gregory street about four feet from the curb. She had  
entered Gregory street at about 6:30 P. M., which is four  
blocks north from the street, and was on his way to the  
Illinois Central Railroad station, which is about two blocks  
south of the street. He estimated his speed at between 10  
to 15 miles an hour. When he was struck he was driving south  
north of the intersection of Gregory and New streets in the  
new plaintiff's automobile, approximately 75 feet west of the



intersection, traveling in an easterly direction at a speed of from 20 to 25 miles an hour, and he observed that she was not slowing down or stopping. He next saw her car when she was out at the intersection, traveling at a speed which he estimated at 35 miles an hour, and he then applied his brakes and turned to his right. The front of the truck collided with the left side of Mrs. Kak's car. Brescia lived only two blocks from the site of the accident and was familiar with the neighborhood.

Although plaintiffs assign eight separate points for reversal, the sole ground argued in their brief is that the court erred in improperly charging the jury. Under rule 7 of the Rules of Practice of the Appellate Court, "A point made but not argued may be considered waived." McGoorty v. Benhart, 305 Ill. App. 458; De Pauw University v. United Electric Coal Companies, 299 Ill. App. 339; and Rauschkolb v. Ruediger, 325 Ill. App. 342. Under the rule and decisions construing it, plaintiffs must be deemed to have waived errors specified but not argued.

The instructions criticized are numbered 12 and 14, wherein plaintiffs are referred to in the plural. It is urged by their counsel that the jury might well have taken these instructions to mean that if the driver of the car were guilty of contributory negligence, then the other occupant could not recover, even if she were guilty of no negligence that contributed to her injury, or that the jury might have believed that some act of the passenger which they deemed negligent, could be imputed to the driver; and that the use of the plural form in these instructions was confusing and improper, and might well have led the jury to an erroneous conclusion as to one or both of the plaintiffs. When considered in the light of



the whole charge, this contention is untenable, because in one of the other instructions the jurors were advised that contributory negligence was "a failure by the person injured to exercise ordinary care for his own safety, which proximately contributes to bring about the injury which is sued for." It is a well-settled rule of law that instructions are to be read as a series and if all the instructions, when considered as a series, fairly and correctly state the law, no error has been committed. People v. Falley, 366 Ill. 545; Cox v. Hrasky, 318 Ill. App. 287.

Aside from this consideration, we think there are other cogent reasons why the judgment should not be reversed. The instructions in this case are not set forth in the record of proceedings, but in the common law record, from which it is impossible to ascertain whether they were offered by plaintiffs or defendants. The record merely makes the following recitation: "And afterwards, to-wit, on the 25th day of April A. D. 1946, certain Given Instructions (18) [were] filed in the office of the Clerk of said Court, in words and figures following, to-wit"; and thereafter appear all the instructions given by the court, without any indication as to which of the parties offered them. Some of the instructions, other than those complained of, which may have been offered by plaintiffs, are subject to the same criticism as instructions numbered 12 and 14, because they also treat plaintiffs in the plural, and the rule is well settled that a party cannot successfully complain of error in an instruction where the same error is in substance contained in an instruction offered by him and given by the court. People v. Belcher, 395 Ill. 348; People v. McGown, 388 Ill. 347.

the whole matter, this contention is untenable, because in one of the other instructions the facts were stated that contradictory evidence was a finding of the person injured to exercise ordinary care for his own safety, which provision is not applicable to the injury which is now before the court. It is a well-known rule of law that instructions are to be read as a whole and if all the instructions when considered as a whole, fairly and correctly state the law, no error has been committed. People v. Kelley, 100 Ill. App. 2d 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

It is from this consideration, that the court should not be reversed.

Other points raised by the defendant should not be reversed.

The defendant in this case has not taken in the

view of psychology, but in the common law view, from

which it is impossible to comprehend the facts of the case.

by the facts of the case, the court should not be reversed.

Following the same line of reasoning, the court should not be reversed.

It is of the fact that the court should not be reversed.

[The] trial in the office of the clerk of the court, in

words and figures following, to-wit: the defendant should

all the instructions given by the court, without any objection

as to which of the parties offered them, and of the in-

structions, other than those mentioned in the court's opinion.

been offered by plaintiff, and subject to the same restrictions

as instructions submitted in and by the defendant and the court.

plaintiff in the trial, and the rule is well settled that

a party cannot successfully complain of error in an instruction

when the same error is in substance contained in another

instruction offered by him and given by the court. People

v. Fisher, 225 Ill. App. 2d 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

-5-

We think that the case was fairly tried, and since we find no convincing reason for reversal, the judgment of the Circuit Court should be affirmed, and it is so ordered.

JUDGMENT AFFIRMED.

Scanlan and Sullivan, JJ., concur.



the British and the French, and since  
we find no continuing reason for the  
of the British and the French, and it is  
ordered.

THE SECRETARY

Secretary and Minister, U.S. State

44054

LORETTA BARNES, Appellant,

v.

CHARLES E. BARNES, Appellee.

93 A  
APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

338 I.A. 644<sup>1</sup>

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff filed a complaint for separate maintenance, to which the defendant filed a plea of res adjudicata, which was overruled. He then filed an answer and subsequently a counterclaim for divorce, alleging desertion on the part of plaintiff. After trial defendant moved to dismiss his crosscomplaint for divorce, but the motion was denied, and an order was entered dismissing both the complaint and cross-complaint for want of equity. Plaintiff appeals from the order dismissing her complaint.

The parties were married in New York in September 1922, then moved to Chicago in March 1940 and resided here together continuously until the latter part of January 1945, when they became separated. One daughter, Loretta, was born in February 1925 and is now living with plaintiff. Defendant was employed as credit manager of The Fair, earning \$6250 per annum.

Plaintiff testified that there was no marital discord until March 1939, when defendant told her that he wanted a divorce, was tired of married life and desired his freedom. He became morose, refused to treat her as his wife and would have no conversation with her except in monosyllables. This attitude toward plaintiff continued until March 1944, when defendant took sleeping quarters on the back porch apart from plaintiff and thereafter ceased permanently to cohabit with her. Plaintiff said that he did so with the declared intent of giving her desertion as a ground for divorce. Defendant,

LORETTA BARNES, Appellant,  
CHARLES E. BARNES, Appellee.

APPEAL FROM SUPREME COURT,  
JOEL HUNTER.

Plaintiff filed a complaint for separate maintenance, to which the defendant filed a plea of non est, which was overruled. The court then entered an order of contempt for failure to obey the order of the court, and an order was entered directing both the defendant and spouse to comply with the order of the court. Plaintiff moved for an order of contempt and the court granted it.

The parties were married in the year of September 1925, then moved to Chicago in 1926. The defendant was a housewife and the plaintiff was a salesman. The parties were separated in 1927 and in 1928 the plaintiff moved to St. Louis, Missouri, and the defendant remained in Chicago. The parties have no children.

Plaintiff testified that he was not married since 1927, and that he was living with a woman named Loretta Barnes. The defendant testified that she was living with the plaintiff and that they were married. The court found in favor of the plaintiff and granted the divorce. The court also ordered the defendant to pay the costs of the suit.

on the other hand, testified that plaintiff had often complained about his snoring, and he added that he was a restless sleeper. By the following September plaintiff had apparently consulted counsel, for defendant was called to the office of her attorney for a conference the latter part of that month. Upon defendant's return home he informed plaintiff that he was opposed to separate maintenance on general principles and would not consent thereto. In October 1944 there was some discussion between the parties about plaintiff's going to California, and when defendant arrived home from work one evening shortly thereafter he learned from the owner of the building that his wife had gone to California. She stayed there about three months, during which time defendant continued to occupy the apartment. When she returned on January 7, 1945 defendant was absent in New York on business and returned January 19. He spent that night in the apartment and went to work the following day. There is some conflict in the evidence as to what happened that evening. Defendant testified that an argument developed between them and about ten o'clock plaintiff told him she was going to find a room, that "this was absolutely the end, she was all through with me, and that she was going to have me arrested for nonsupport." Defendant told her that there was no necessity for her getting another room as he would sleep on the back porch. Plaintiff gave a different version. She said that when defendant came back from New York he passed her without speaking; that after dinner he brought in a cot from the back porch which he set up in the rear bedroom, said that he was going to sleep there and she could be sure that he would not disturb her. She testified that she told him it would be silly to do that since they had a large bedroom with a double bed and that

on the other hand, testified that plaintiff had often complained about his anxiety, and he added that he was a restless sleeper. By the following September plaintiff had apparently consulted counsel, for defendant was called to the office of her attorney for a conference the latter part of that month. Upon defendant's return home he informed plaintiff that he was opposed to separate maintenance on general principles and would not consent thereto. In October 1944 there was some discussion between the parties about plaintiff's going to California, and when defendant arrived home from work one evening shortly thereafter he learned from the owner of the building that his wife had gone to California. He stayed there about three months, during which time defendant continued to occupy the apartment. When she returned on January 7, 1945 defendant was absent in New York on business and returned January 19. He spent that night in the apartment and went to work the following day. There is some conflict in the evidence as to what happened that evening. Defendant testified that an argument developed between them and about ten o'clock plaintiff told him she was going to find a room, that "this was absolutely the end, she was all through with me, and that she was going to have me arrested for non-support." Defendant told her that there was no necessity for her looking for another room as he would sleep on the back porch. Plaintiff gave a different version. She said that when defendant came back from New York he passed her without speaking; that after dinner he brought in a cot from the back porch which he set up in the rear bedroom, said that he was going to sleep there and she could be sure that he would not disturb her. She testified that she told him it would be silly to do that since they had a large bedroom with a double bed and that



defendant then said that he was going to give her grounds for desertion.

Defendant testified that plaintiff left home on January 20, and in his answer he set up that on January 23 she filed her complaint for separate maintenance in the Circuit Court, case No. 45-C-658. However, she retained the use of the apartment and came there on many occasions after filing her complaint. Defendant further testified that after instituting suit she asked him to rent the apartment to some friends of hers when she learned he did not intend to renew the lease, and he acceded to her request; that plaintiff then took over the furniture, sold some and shipped part thereof to California; and that she returned to California following the separation in January 1945 and remained there until late in April. Some time after her return to Chicago the case pending in the Circuit Court came on for trial, resulting in an order of dismissal for want of equity on August 7, 1945. Defendant testified that plaintiff told him she did not know that the Circuit Court suit had been dismissed because she had no contact with her attorney after leaving for California.

On September 9, 1945 plaintiff wrote the defendant a letter which she sent by registered mail to his home and which reads as follows: "Mig [their daughter] and I have been talking things over and we are not at all happy with our little family split the way it is. We both love you and miss you and hope that as you have not seen us since June that, maybe, you miss us too. We expect to give up this furnished apartment October first and while Mig and I have been trying to locate a small place for us we would be much happier if you would join us and let us take up our home together as it was, seven or eight years ago. We have all made mistakes and

defendant then said that he was going to give her money for abortion.

Defendant testified that she left home on January 30, and in his answer he said he filed on January 25 the filed her complaint for separate maintenance in the Circuit Court, case No. 43-0-072. However, she retained the use of the apartment and came there on many occasions after filing her complaint. Defendant further testified that after investigation and she asked him to rent the apartment to some friends of hers when she learned he did not intend to return the lease, and he acceded to her request; that plaintiff then took over the furniture, sold some and shipped some to defendant; and that she returned to California following the separation in January 1947 and remained there until late in April. Some time after her return to Chicago the case pending in the Circuit Court came on for trial, resulting in an order of judgment for want of equity on August 7, 1947. Defendant testified that plaintiff told him she did not know that the Circuit Court suit had been dismissed because she had no contact with her attorney after leaving for California.

On September 2, 1947, plaintiff wrote the defendant a letter which was sent by registered mail to his home and which reads as follows: "Mig [brother-in-law] and I have been raising things over and we are not at all happy with our little family split the way it is. We both love you and miss you and hope that as you have not seen us since June last, maybe, you miss us too. We expect to give up this furnished apartment October first and while Mig and I have been trying to locate a small place for us we would be much happier if you would join us and let us take up our home together as it was, seven or eight years ago. We have all made mistakes and

I, for one, am heartily sorry for those I have made, but I feel we have all learned a lot too. Life is so very short at best that it is too bad for three people to remain lonely and unhappy when the situation could be changed. Our silver, linens, dishes and many other things are in storage here in Chicago and it would not take too long nor too much for us to start planning our home again so that you, Mig and I could be together as we should be. Will you let us hear from you before the first of October? My love as always, Loretta."

In response to that letter defendant called on her and stated that he was not interested in reconciliation and that he was going to fight separate maintenance as long as he lived, but if she were interested in a divorce he would consent to one on any ground she mentioned. She told him that she was interested only in reestablishing their home and would not consider a divorce on any condition. Defendant then cut her allowance, and she instituted these proceedings September 26, 1945. Plaintiff testified that she made repeated requests for reconciliation but that her husband persistently refused, and defendant admitted that from the latter part of January 1945 up to and including the time of the trial he had never asked his wife to come back to him and that she, on the other hand, had frequently asked him to return to her. On March 25, 1946 plaintiff again wrote defendant that she and their daughter wanted their home together with him, that they "could make a go of it \* \* \* if just the three of us were considered, without any outside interference," that she was not interested in divorce "now nor any other time," that others who had gone through this same thing found out that it is never too late to patch things up if they were willing to do a little patching, and "anytime you want to do anything

I, for one, am heartily sorry for those I have said, but I feel we have all learned a lot too. Life is so very short at best that it is too bad for three people to remain lonely and unhappy when the situation could be changed. Our silver, linens, dishes and many other things are in storage here in Chicago and it would not take too long nor too much for us to start planning our home again so that you, Ed and I could be together as we should be. Will you let us hear from you before the first of October? My love to Ed and, Dorothy."

In response to that latter defendant called on her and stated that he was not interested in reconciliation and that he was going to fight separate maintenance as long as he lived, but if she were interested in a divorce he would consent to one on any ground she mentioned. She told him that she was interested only in reestablishing their home and would not consider a divorce on any condition. Defendant then set her allowance, and she instituted these proceedings September 20, 1945. Plaintiff testified that she made repeated requests for reconciliation but that her husband persistently refused, and defendant admitted that from the latter part of January 1945 up to and including the time of the trial he had never asked his wife to come back to him and that she, on the other hand, had frequently asked him to return to her. On March 25, 1946 plaintiff again wrote defendant that she and their daughter wanted their home together with him, that they "could make a go of it \* \* \* if just the three of us were considered, without any outside interference," that she was not interested in divorce "now nor any other time," that others who had gone through this same thing found out that it is never too late to patch things up if they were willing to do a little patching, and "anytime you want to do anything



towards rebuilding our home and getting together again, you have only to let me know." She concluded the letter by saying, "You have now, as you have had for the past twenty-four years, all my love. Loretta." On hearing, plaintiff's counsel asked defendant whether he answered this letter, to which he replied as follows: "Let me see it again so I can refresh my memory on that. I doubt very much, if I saw her, I do not remember, I don't believe I did, I don't think there was any occasion to because the matters referred to [were] attended to." The record also shows that the daughter made several attempts to bring about a reconciliation between her parents but that defendant refused, saying that he was not interested in any reconciliation.

Defendant's counsel argues, and the court was evidently of the opinion, that plaintiff was not living separate and apart from her husband without any fault on her part. However, the only reasonable conclusion to be reached from an examination of the record is that defendant grew tired of the marital relationship and desired his freedom. He thereupon entered upon a course of conduct calculated to induce plaintiff to seek a divorce upon some ground of her own choosing and ceased to cohabit with her after March of 1944. Although the parties resided in the same apartment until the latter part of January 1945, they had for almost a year ceased to do so as husband and wife, and this status was largely the result of defendant's conduct. His repeated demands that she consent to a divorce and his refusal to continue to adequately support her eventually disrupted the relationship.

The law applicable to these facts is well settled in this state. In Haley v. Haley, 209 Ill. App. 153, the wife on appeal sought to have reversed a decree dismissing for



towards rebuilding our home and getting together again, you have only to let me know." The conclusion of the letter by saying, "You have now, as you have had for the past twenty-four years, all my love, forever." On receiving Plaintiff's counsel asked defendant whether he inserted this letter, to which he replied as follows: "Let me see it again so I can refresh my memory on that. I don't very much, it's a long time I do not remember, I don't believe it did, I don't think there was any occasion to discuss the letters referred to [were] attached to." The record also shows that the defendant made several attempts to bring about a reconciliation between her parents but that defendant refused, saying that he was not interested in any reconciliation.

Defendant's counsel argues, and the court has evidently of the opinion, that Plaintiff was not living separately and apart from her husband without any fault on her part. However, the only reasonable conclusion to be reached from an examination of the record is that defendant exercised of the marital relationship and desired his freedom. He thereupon entered upon a course of conduct calculated to induce Plaintiff to seek a divorce upon some ground of her own choosing and ceased to cohabit with her after March of 1944. Although the parties resided in the same apartment until the latter part of January 1945, they had for almost a year ceased to do so as husband and wife, and this state was largely the result of defendant's conduct. His repeated demands that she consent to a divorce and his refusal to continue to adequately support her eventually disrupted the relationship.

The law applicable to these facts is well settled in this state. In Halley v. Halley, 209 Ill. App. 133, the wife on appeal sought to have reversed a decree dissolving for

want of equity her bill for separate maintenance, and this court held: "It is the law in this State that under such circumstances [where the deserting wife made repeated and bona fide offers to return to her husband and resume marital relations] it is the duty of the husband to receive the wife and properly provide for her, and that should he refuse to perform this duty it cannot then be said that she is living apart from her husband through her fault." Garvy v. Garvy, 310 Ill. App. 169, deals with a situation in which the wife for the second time had brought suit for separate maintenance, this court in the original action having granted no relief, for want of equity, either to the husband seeking divorce or to the wife seeking separate maintenance. Subsequently the wife made an unsuccessful attempt to effect a reconciliation, and this court commented: "It must be borne in mind that these parties are still husband and wife and it is the duty of the husband to support his wife. This is a continuing obligation and, even though the wife should leave the husband for a time, she has a right to return to their home as was done in the instant case for the purpose of resuming the status of husband and wife. \* \* \* Should the intention of the statute be construed to be otherwise and, by its terms, the husband become immune from the duty to provide for his wife, then he would be having the benefits of a separation or divorce from his wife without a court decree and be relieved of all responsibility. That was not the intention of the legislature." See also: Thomas v. Thomas, 152 Ill. 577; Hoffman v. Hoffman, 316 Ill. 204; and Levy v. Levy, 388 Ill. 179.

As the result of the dismissal of the complaint and crosscomplaint in this proceeding, the parties are still hus-



band and wife, and it is undoubtedly his duty to support her. It is significant, however, that defendant resigned his position with The Fair and disappeared. On oral argument his counsel stated that he did not know where defendant was at that time. If the decree dismissing the complaint were sustained, defendant would be at liberty to go to some other jurisdiction and get the divorce which he has so long sought and thus free himself of his legal obligation to support plaintiff, which is probably what he had in mind when he left a fairly lucrative position and disappeared.

Defendant's counsel argues that plaintiff's offers of reconciliation were not made in good faith. In view of her many futile attempts at reconciliation, both oral and written, this contention is untenable. In fact, defendant's counsel stated that there was no hope of a reconciliation, saying to the court: "This man, Mr. Barnes, absolutely refuses to consider reconciliation."

Under the circumstances we are constrained to hold that Mrs. Barnes was living separate and apart from her husband without any fault on her part and that it was error on the part of the court to dismiss her complaint for want of equity.

The only other point that requires discussion is defendant's contention that the dismissal of the Circuit Court suit constituted res adjudicata. Plaintiff states in her brief that Judge Reid of the Circuit Court dismissed the suit because it had been prematurely filed. In the case at bar defendant made no proof whatever as to what issues arose in the prior suit in the Circuit Court, what evidence was presented or what pleadings were filed. Where a party relies on a prior adjudication he assumes the burden of showing in the second

band and wife, and it is undoubtedly his duty to support her. It is significant, however, that defendant read his position with The Year and disappeared. On oral argument his counsel stated that he did not know where defendant was at that time. If the degree of dissolving the complaint were sustained, defendant would be at liberty to go to some other jurisdiction and get the divorce which he has so long sought and thus free himself of his legal obligation to support plaintiff, which is probably what he had in mind when he left a fairly lucrative position and disappeared.

Defendant's counsel argues that plaintiff's offers of reconciliation were not made in good faith. In view of her many futile attempts at reconciliation, both oral and written, this contention is untenable. In fact, defendant's counsel stated that there was no hope of a reconciliation, saying to the court: "This man, Mr. Barnes, absolutely refuses to consider reconciliation."

Under the circumstances he was constrained to hold that Mrs. Barnes was living separate and apart from her husband without any fault on her part and that it was error on the part of the court to dismiss her complaint for want of equity.

The only other point that requires discussion is defendant's contention that the dismissal of the Circuit Court suit constituted res judicata. Plaintiff states in her brief that Judge Reid of the Circuit Court dismissed the suit because it had been previously filed. In the case at bar defendant made no proof whatever as to what issues arose in the prior suit in the Circuit Court, what evidence was presented or what pleadings were filed. Where a party relies on a prior adjudication he assumes the burden of showing in the second



trial that the same issue was presented upon the former hearing, and presumably if proof had been made in this proceeding showing that the prior suit was dismissed because it was prematurely brought, the defense of res adjudicata would not have been available.

From an examination of the record it is clear that defendant wanted a divorce and having no grounds upon which he could be awarded one, endeavored to compel his wife to seek a divorce upon grounds of her own choosing; and failing in that plan he commenced a course of conduct which eventually compelled her to leave him. Having attained this end he refused to permit her to take up her home and cohabit with him as his wife or to become reconciled. He then resigned his position and left the state, thus clearly seeking to evade his obligation of supporting his wife.

Under the circumstances we think the decree of the Superior Court should be reversed and the cause remanded with directions to enter a decree for separate maintenance in favor of plaintiff, and it is so ordered.

DECREE REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

Scanlan and Sullivan, JJ., concur.

trial that the same issue was presented again the former  
- hearing, and presumably it would have been held in this pre-  
ceding showing that the prior suit was dismissed because it  
was prematurely brought, the defense of res judicata  
would not have been available.

From an examination of the record it is clear that  
defendant wanted a divorce and saying so should have been  
he could be awarded one, answered in support of his claim to  
seek a divorce upon grounds of just and equitable; and failing  
in that plan he demanded a decree of contempt which eventually  
compelled her to leave him, saying nothing but was in the  
need to permit her to take up her home and establish with him  
as his wife or to become responsible. He then retained this  
position and left the state, and finally seeking to evade  
his obligation of support and care.

Under the circumstances we think the decree of the  
superior court should be reversed and the cause remanded  
with directions to enter a decree for divorce and alimony  
in favor of plaintiff, and if it is so ordered.

Very truly yours,  
JAMES M. HARRIS, JR.  
Attorney for Plaintiff.

Witness my hand and seal, this 11th day of March, 1914.

333 I.A. 644<sup>2</sup>

43794

ALBERTA W. HUMSBERGER and  
JULIA W. SNEAD, Appellees,

v.

G. CLAYTON MITCHELL and  
RACHEL MITCHELL, his wife;  
ALVIN H. CULVER; ZOPHER L.  
JENSEN; LEONARD BERNARD;  
ELINOR VAN HORNE, and  
JAMES B. MCKEON, Defendants.

And

JAMES B. MCKEON, Appellee,

v.

LEONARD M. BERNARD,  
Defendant.

No. 43-C-12146

As

Consolidated

APPEAL FROM  
CIRCUIT COURT,  
COOK COUNTY.

No. 43-C-8051

LEONARD M. BERNARD, One of  
the Defendants in Cause  
No. 43-C-12146 and Sole  
Defendant in Cause No.  
43-C-8051,  
Appellant.

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This appeal by Leonard M. Bernard involves two cases that were consolidated in the trial court, No. 43-C-12146, a proceeding in chancery, and No. 43-C-8051, a law case. James B. McKeon was the plaintiff in the law case and Bernard was the sole defendant in that case. Bernard was also one of the defendants in the chancery proceedings. He appeals from two judgment orders, one entered December 17, 1945, and the other entered March 13, 1946. The latter judgment order involved only a motion by Bernard (hereinafter also called appellant) for the court to reconsider its judgment order entered December 17, 1945, which motion was denied. No petition or affidavit was filed in support of that motion. The following is the

8331A-644

43794

ALBERT F. WILSON and  
JULIA W. WILSON,  
Appellants,

No. 43-11140

vs.

Consolidated

E. GEORGE WILSON and  
RUTH WILSON, his wife;  
LEWIS E. WILSON; and  
JAMES E. WILSON;  
JAMES E. WILSON, and  
JAMES E. WILSON,  
Respondents,

and

No. 43-11141

JAMES E. WILSON,  
Appellant,

LEONARD E. WILSON,  
Respondent.

LEONARD E. WILSON, one of  
the defendants in cause  
No. 43-11140 and 43-11141,  
Respondent in cause No.  
43-11141,  
Appellant.

MR. JUSTICE STEPHEN BREWER: THE ORDER OF THE COURT.

This appeal by LEONARD E. WILSON involves two cases

that were consolidated in the trial court, No. 43-11140, a

proceeding in equity, and No. 43-11141, a law case, James

E. Wilson was the plaintiff in the law case and respondent was

the sole defendant in that case. Leonard was also one of the

defendants in the equity proceedings. The appeals from two

judgment orders, one entered December 17, 1945, and the other

entered March 13, 1946. The latter judgment order involved

only a motion by Leonard (herein after called appellant)

for the court to reconsider its judgment order entered December

17, 1945, which motion was denied. No petition or affidavit

was filed in support of that motion. The following is the

WILSON  
STREET COURT  
BOOK NO. 43-11140

order of December 17, 1945:

"This cause coming on this day to be heard upon the motion of plaintiffs [Alberta W. Hunsberger and Julia W. Snead] to strike the counterclaim of defendant, Leonard Bernard, heretofore filed herein, and for judgment, and also upon the motion of defendants, G. Clayton Mitchell and James B. McKeon, cross-defendants, to strike the counterclaim of defendant, Leonard Bernard, and the Court having considered the files and proceedings herein and having heard the arguments of counsel and being fully advised in the premises,

"IT IS CONSIDERED, ORDERED AND DECREED:

"1. The motion of plaintiffs to strike the counterclaim of Leonard Bernard as to plaintiffs and for judgment be and the same is hereby sustained, and the said counterclaim is ordered stricken as to plaintiffs.

"2. The motion of plaintiffs for the dismissal of their complaint as to defendant, Leonard Bernard, and as to all other defendants be and the same is hereby sustained and this cause is hereby ordered dismissed, without costs to any party, all costs having been paid.

"3. The motion of defendants, G. Clayton Mitchell and James B. McKeon, to strike the counterclaim of defendant, Leonard Bernard, be and the same is hereby sustained, and the said counterclaim is ordered stricken.

"4. The law action, Cause No. 43-C-8051, entitled James B. McKeon, plaintiff, vs. Leonard Bernard, defendant, which was heretofore on June 1, 1944, consolidated with this cause, is hereby ordered transferred to the law side of this court for trial upon the issues thereof and the said cause, No. 43-C-8051, is hereby ordered referred to the Executive Committee of this court for reassignment.



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W. ALTON and co-workers, J. Astoria [1955] 79, 100, 101.

• 1200 1000 800 600 400 200 0

populations on June 1, 1966, compared with 1965, is

1007 JANUARY 1942 THE BUREAU OF AERONAUTICS REPORT NO. 1007

It is hereby certified that the foregoing is a true and correct copy of the original as the same appears in the records of the

• JOURNAL OF THE

"5. The Clerk of this Court is hereby ordered and directed to pay to plaintiff, James B. McKeon, the sum of \$1470.44 heretofore deposited with the Clerk by defendant, Leonard Bernard, in satisfaction of the partial judgment for \$1381.56, interest and costs, previously entered in the said law cause No. 43-C-8051, entitled James B. McKeon v. Leonard Bernard, which said sum of \$1470.44 was ordered to be deposited with the Clerk pending the outcome of the chancery suit, by an order of court entered herein on June 1, 1944.

"To the entry of all of the foregoing orders, defendant Leonard Bernard, by his counsel, duly excepts."

On July 22, 1943, judgment by confession for \$3,381.56 and costs was entered in the law case against appellant upon his promissory note. A writ of execution followed. Upon September 7, 1943, appellant filed a motion, supported by his affidavit, to vacate the said judgment, and on March 13, 1944, the following judgment order was entered:

"2. That the judgment heretofore entered in this cause is opened up in the amount of Two thousand dollars and, as to said amount, the defendant is granted leave to make defense to said judgment on the following issues only:

"(a) Whether the plaintiff, James B. McKeon, was the holder of the note in question at the time judgment was entered;

"(b) The defendant is given the right to present his defense as set forth in his said affidavit and amendments thereto, insofar as such defense pertains to the alleged defects in the roof and foundation of the premises at 2606 Glenview Avenue, Glenview, Illinois, purchased by the defendant from one Mitchell;

"3. As to all other defenses to said judgment set forth in the defendant's affidavit and amendments thereto, the motion to open up the judgment is denied;

2. The Clerk of this Court is hereby ordered and directed to pay to Plaintiff, James E. Brown, the sum of \$17.44 heretofore deposited with the Clerk of said Court, in a satisfaction of the partial judgment for Plaintiff, James E. Brown, previously entered in Case No. 12, Cause No. 43-C-244, entitled James E. Brown v. Leonard Bernard, which said sum of \$17.44 was ordered to be deposited with the Clerk pending the outcome of the summary trial, by an order of court entered heretofore on June 2, 1944.

"3. The entry on all of the foregoing orders, judgments and decrees, be and remain, null and void."

On July 22, 1944, Plaintiff by motion for \$17.44, and costs was entered in the case against defendant upon the foregoing facts. A bill of exceptions followed. Upon September 7, 1944, defendant filed a motion, supported by his affidavit, to vacate the said judgment, and on March 13, 1945, the following judgment order was entered:

"1. That the judgment heretofore entered in this cause is opened up in the amount of Two Thousand Dollars and, as to said amount, the defendant is granted leave to set aside the said judgment on the following terms only:

"(a) That the Plaintiff, James E. Brown, and the holder of the note in question at the time judgment was entered;

"(b) The defendant is given the right to present his defense as set forth in his affidavit and supporting affidavits to, insofar as such defense pertains to the alleged defect in the roof and foundation of the premises at 2000 Northview Avenue, Glenview, Illinois, purchased by the defendant from one Libbelle."

"3. As to all other defenses to said judgment set forth in the defendant's affidavit and amendments thereto, the motion to open the judgment is denied;

"4. That as to the balance of said judgment, One thousand three hundred eighty-one dollars and fifty-six cents and costs, the motion to open up the judgment is denied and execution may immediately issue thereon pursuant to the law;

"5. That as to the amount of Two thousand dollars mentioned in paragraph 3 above, the judgment shall stand as security pending the trial of the issues above mentioned;

"6. That the affidavits and amendments thereto filed by the parties stand as their respective pleadings, and that each party may file such additions or amendments to said pleadings as may be proper;

"7. Trial by jury is granted to either party upon payment of proper charges to the clerk upon the entry of this order."

No appeal was taken by appellant from the foregoing judgment and it is therefore res judicata as to him. On June 1, 1944, an order was entered that appellant should deposit with the clerk of the court "the sum of Fourteen Hundred Seventy Dollars and Forty-four Cents, being the partial judgment entered in said suit of McKeon vs. Bernard in the amount of \$1381.56, with costs of \$28.50 and interest of \$60.38 thereon to June 2nd, 1944, which said sum of \$1470.44 shall be held by the Clerk of this Court until the further order of the Court, and 4. That upon said deposit of said sum of \$1470.44 by said Leonard Bernard with the Clerk of this Court, the said partial judgment for \$1381.56 against said Leonard Bernard in favor of said James B. McKeon in cause 43-C-8051 shall forthwith be satisfied of record by the Clerk of this Court." On June 9, 1944, upon appellant's motion an order was entered finding that he had deposited with the clerk of the court, pursuant to the order of the court, the

4. That as to the balance of said judgment, the

thousand three hundred and fifty-one dollars and fifty-one

cents and cents, the balance is due to the plaintiff as

and attorney-in-fact, and the balance is due to the

law;

5. That as to the amount of the interest on the

judgment in the sum of \$1,000.00, the plaintiff shall be

secured by the sum of \$1,000.00, the balance of the

4. That the defendant has no other assets or

by the parties to the said judgment, and that

each party may file a motion to set aside the

pleadings as may be proper;

6. That the party in default of judgment shall pay the

costs of the proceedings to the party in default of

order.

7. That the party in default of judgment shall pay the

judgment and if the defendant shall fail to pay the

1, 1944, the party in default of judgment shall be

with the clerk of the court, the sum of the judgment and

costs and interest, and the party in default of judgment

in said sum of \$1,000.00, the party in default of judgment

with the clerk of the court, the sum of the judgment and

1944, which said sum of \$1,000.00 shall be paid to the

this court until the further order of the court, and that

upon this report of the clerk of the court, the party in

with the clerk of the court, the sum of the judgment and

\$1,000.00 shall be paid to the clerk of the court, and

reason in cases of the kind, the party in default of judgment

by the clerk of the court, the sum of the judgment and

motion an order was entered finding that the party in

the clerk of the court, pursuant to the order of the court, the



sum of \$1,470.44 in full payment of the judgment, together with costs and interest thereon, entered against appellant in case No. 43-C-8051, and that said judgment should be satisfied of record, and it was ordered that the said judgment against appellant be fully satisfied of record. On November 9, 1943, Alberta W. Hunsberger and Julia W. Snead, appellees, filed their complaint in chancery against G. Clayton Mitchell and Rachel C. Mitchell, his wife, Alvin H. Culver, and others, in which they asked that an express or resulting trust be declared in certain real estate held in the name of said Mitchell. The complaint is a lengthy one and in disposing of this appeal we deem it unnecessary to state all of its allegations. It alleges, inter alia, that Culver and Mitchell had built a house upon one parcel of the land in question and that they subsequently purchased one acre from plaintiffs, which included the lot upon which the said house was built; that Culver and Mitchell sold the house to appellant and that subsequently they sold to appellant, for cash, a lot which was taken from other land of plaintiffs to which Mitchell had legal title and which was a part of the tract which plaintiffs owned, and that Culver and Mitchell failed to account to plaintiffs for the cash proceeds thereof. The complaint further alleges that any sum for which appellant was indebted to Culver and Mitchell was in fact the property of plaintiffs, and plaintiffs prayed, inter alia: "(i) That defendant, Leonard Bernard, be restrained from making any further payments to any of the other defendants of any sums due from him by reason of his purchase of any part of the trust estate, until such amounts [as] shall be decreed to be due from said defendants, Alvin H. Culver, G. Clayton Mitchell and Zopher L. Jensen, shall have been paid to the plaintiffs and if the said amounts shall not be paid

sum of \$1,270.44 in full payment of the judgment, together with costs and interest thereon, entered against appellant in case No. 43-2-3081, and that said judgment should be satisfied of record, and it was ordered that the said judgment against appellant be fully satisfied of record. On November 9, 1943, Alberta W. Thompson and Julia W. Reed, appellants, filed their complaint in summary judgment against G. Clayton Mitchell and Rachel C. Mitchell, his wife, Alvin H. Oliver, and others, in which they asked that an order or restraining trust be declared in certain real estate held in the name of said Mitchell. The complaint is a lengthy one and in disposition of this appeal we deem it necessary only to state all of its allegations. It alleges, inter alia, that Oliver and Mitchell had built a house upon one parcel of the land in question and that they subsequently purchased one acre from plaintiffs, which included the lot upon which the said house was built; that Oliver and Mitchell sold the house to appellant and that subsequently they sold to appellant, for cash, a lot which was taken from other land of plaintiffs to which Mitchell had legal title and which was a part of the tract which plaintiffs owned, and that Oliver and Mitchell failed to convey to plaintiffs for the cash proceeds thereof. The complaint further alleges that any sum for which appellant was indebted to Oliver and Mitchell was in fact the property of plaintiffs, and accordingly prayed, inter alia: "(1) That defendant, Leonard Howard, be restrained from making any further payments to any of the other defendants of any sums due from him by reason of his purchase of any part of the trust estate, until such amounts shall be decreed to be due from said defendants, Alvin H. Oliver, G. Clayton Mitchell and Rachel C. Thompson, shall have been paid to the plaintiffs and if the said amounts shall not be paid

promptly, that a decree be entered against said Leonard Bernard, requiring him to make any such payments due or to become due to the plaintiffs." Plaintiffs did not question, in their complaint, appellant's title to the property which he purchased, and they did not charge that he participated in any way in any transaction detrimental to plaintiffs. On June 1, 1944, James B. McKeon, appellee, was made a party defendant to the chancery proceedings, and the law case, 43-C-8051, was consolidated with the chancery proceedings by order of the court. Appellant filed an answer to the complaint in the chancery proceedings and also filed a counterclaim in which he, to quote from his brief, "affirmatively set forth his claims against Clayton Mitchell and McKeon arising by reason of the transaction in regard to the purchase by Bernard from Clayton Mitchell of the real estate, the ownership of which was claimed by the chancery plaintiffs; and also Bernard affirmatively challenged the right of the chancery plaintiffs to the moneys deposited with the Clerk of the Court, and claimed an equitable lien thereon for the damages sustained by Bernard by reason of the failure of plaintiffs' trustee, Clayton Mitchell, to perform his obligations in regard to the trust property, and for the costs incurred by Bernard in being required to appear and defend against the action brought by the chancery plaintiffs; also Bernard prayed that an accounting be had by and between all parties to the litigation."

The litigation in the chancery proceedings between the plaintiffs therein and defendants Culver and Mitchell was settled, and the said parties entered into a stipulation, which was filed in court, to vacate the order of consolidation of the law case and the chancery proceedings and to dismiss the chancery suit. The plaintiffs in the chancery proceedings then filed a motion to vacate the order of consolidation of the law case and the

promptly, that a decree be entered against said Bernard Bernard, requiring him to make any such payments due or to become due to the plaintiffs. "The plaintiffs did not question, in their complaint, appellant's title to the property which he purchased, and they did not charge that he participated in any way in any transaction detrimental to plaintiffs. On June 1, 1944, James E. Brown, appellee, was made a party defendant to the chancery proceedings, and the law case, 43-C-8021, was consolidated with the chancery proceedings by order of the court. Appellant filed an answer to the complaint in the chancery proceedings and also filed a counterclaim in which he, to quote from his brief, "affirmatively set forth his claims against Clayton Mitchell and Bernard Bernard by reason of the transaction in regard to the purchase of property from Clayton Mitchell of the real estate, the ownership of which was claimed by the chancery plaintiffs; and also Bernard Bernard affirmatively challenged the right of the chancery plaintiffs to the moneys deposited with the Clerk of the Court, and claimed an equitable lien thereon for the damages sustained by Bernard by reason of the failure of plaintiffs' trustee, Clayton Mitchell, to perform his obligations in regard to the trust property, and for the costs incurred by Bernard in being required to appear and defend against the action brought by the chancery plaintiffs; also Bernard prayed that an accounting be had by and between all parties to the litigation."

The litigation in the chancery proceedings between the plaintiffs therein and defendants Oliver and Mitchell was settled and the said parties entered into a stipulation, which was filed in court, to vacate the order of consolidation of the law case and the chancery proceedings and to dismiss the chancery suit. The plaintiffs in the chancery proceedings then filed a motion to vacate the order of consolidation of the law case and the



chancery proceedings and to dismiss the chancery suit. The objection of appellant to the said motion was sustained, upon the ground, apparently, that a counterclaim had been filed by him. The plaintiffs in the chancery proceedings then filed a written motion praying that the counterclaim of appellant be stricken as to them. This motion set up the following grounds in support of it:

"1. That the said counterclaim and each and every paragraph thereof complains of acts and doings of defendant, G. Clayton Mitchell, and other defendants, and nowhere sets forth any right of the defendant, Leonard Bernard, against these plaintiffs, nor any breach of duty to defendant, Leonard Bernard, on the part of these plaintiffs, nor any injury of said defendant, Leonard Bernard, by these plaintiffs.

"2. Said counterclaim does not state any cause of action upon which any relief could be granted in favor of defendant and counterclaimant, Leonard Bernard, against these plaintiffs.

"3. These plaintiffs are not made parties to the said counterclaim.

"4. No relief is prayed by said counterclaim against these plaintiffs."

Subsequently the order of December 17, 1945, was entered.

Appellant contends that his "counterclaim sufficiently sets forth a cause of action in equity against defendant McKeon, the defendant Mitchell and the plaintiffs in the chancery proceedings," and that "after a counterclaim has been pleaded by a defendant, no voluntary dismissal of the case may be had except (1) by the consent of such defendant and (2) on the payment of such defendant's costs." This contention insofar as it applies to the plaintiffs in the chancery proceedings is clearly without



chancery proceedings and to discontinue the same. The objection of respondent to the said motion was overruled, upon the ground, apparently, that a counterclaim had been filed by him. The plaintiff in the chancery proceedings then filed a written motion praying that the counterclaim be dismissed as without merit. This motion set up the following grounds in support of it:

"1. That the said counterclaim is in vain and every paragraph thereof comprised of mere allegations of defendant, E. Clayton Mitchell, and other statements, and contains no facts and rights of the defendant, Leonard Bernard, against these plaintiffs, nor any promise or duty to defendant, Leonard Bernard, on the part of these plaintiffs, nor any injury to said defendant, Leonard Bernard, by these plaintiffs.

"2. Said counterclaim does not state any cause of action upon which any relief could be granted in favor of defendant and counterclaimant, Leonard Bernard, against these plaintiffs.

"3. These plaintiffs are not male parties to the said counterclaim.

"4. No relief is prayed by said counterclaim against these plaintiffs."

Subsequently the order of December 17, 1945, was entered, wherein the court held that the counterclaim was timely and that a cause of action in equity existed between them, the defendant Mitchell and the plaintiffs in the chancery proceedings, and that "after a counterclaim was filed by a defendant, no voluntary dismissal of the case may be had except (1) by the consent of such defendant and (2) on the payment of such defendant's costs." This contention thereafter as it applies to the plaintiffs in the chancery proceedings is clearly without

merit. In his counterclaim appellant makes no charges against said plaintiffs, asserts no cause of action against them, and prays for no relief against them. In this court appellant seems to realize that his counterclaim fails to state any case against said plaintiffs and he is forced to make an entirely unwarranted charge that the trial court was guilty of a clear and manifest abuse of his discretion in not affording him an opportunity to file an amended counterclaim, and he insists that "the abuse of sound judicial discretion by the trial court constitutes reversible error." There is nothing in the record to show that appellant at any time asked the trial court for leave to file an amended counterclaim. No other reasonable conclusion can be drawn from the order of December 17, 1945, than that appellant elected to abide by his counterclaim. That order recites that the cause is dismissed as to all defendants "without costs to any party, all costs having been paid," and there is nothing in the record that impeaches this finding of the trial court as to the costs.

In passing upon the contention of appellant that the trial court erred in dismissing his counterclaim against defendants McKeon and Mitchell, the effect of the judgment order of March 13, 1944, must first be considered. The motion of appellant to vacate the judgment by confession entered on July 22, 1943, called for the exercise of the equitable power of the court over its own judgment. "A court of law, being invested with such power, will not send a defendant against whom a judgment has been entered by confession, to a court of equity for redress, but the power, whether exercised by a court of law or of equity, is an equitable one, to be governed by the same principles." (Blake v. State Bank of Freeport, 178 Ill. 182, 184.) In the judgment order of March 13, 1944, the judgment by confession was opened up "in the

merit. In his constitutional argument based on charges against said plaintiffs, asserts no basis of action against them, and prays for no relief against them. In this court plaintiff seeks to realize that his constitutional rights are being invaded against said plaintiffs and he is forced to make an entirely unnecessary charge that the trial court was guilty of a clear and manifest abuse of its discretion in not refusing him an opportunity to file an amended constitutionally, and he insists that the court should judicially ascertain if the trial court's constitutionality is in error. There is nothing in the record to show that appellant at any time asked the court to allow him to file an amended constitution. In other reasonable construction can be drawn from the order of November 13, 1944, than that appellant elected to abide by his constitution. That order recited that the case is dismissed as to all defendants "without costs to any party, all costs having been paid," and there is nothing in the record that indicates the finding of the trial court as to the costs.

In passing upon the constitutionality of the trial court's order given in this case, the court is not to be guided by the action and decision, the effect of the judgment order of March 13, 1944, must first be considered. The action of appellant to vacate the judgment by confession entered on July 13, 1944, called for the exercise of the appellate power of the court, and its own judgment. "A court of law, with respect to its own power, will not send a defendant against whom a judgment has been entered by confession, to a court of equity for relief, and the power, whether exercised by a court of law or of equity, is an appellate one, to be governed by the same principles." (State ex. rel. Bank of Fremont, 178 Ill. 182, 184.) In the judgment order of March 13, 1944, the judgment by confession was entered "in the

amount of Two thousand dollars," and it was provided that appellant might make defense to said judgment as to such amount upon two issues: (a) Whether the plaintiff, James B. McKeon, was the holder of the note in question at the time judgment was entered; and (b) giving appellant the right to make a defense insofar as it pertained to the alleged defects in the roof and foundation of the premises purchased by appellant from one Mitchell. As we have heretofore stated, no appeal was taken by appellant from that judgment, and it is therefore res judicata as to him, and it must be noted that appellant, in compliance with the judgment order of June 1, 1944, deposited with the clerk of the court \$1,470.44, and that later, upon his motion, the said partial judgment against him was fully satisfied of record. The present claim of appellant that he has a lien upon the money so deposited by him is an afterthought and without the slightest merit. In the order of March 13, 1944, appellant was given the right to present his defense, insofar as it pertained to the alleged defects in the roofing and foundation of the premises at 2606 Glenview avenue, purchased by him from Mitchell, but all other defenses set forth in appellant's affidavit and amendments thereto were denied. At the time of the entry of the order of March 13, 1944, appellant was, apparently, satisfied with the provisions in the order, and he still has the right in the law case to make his defense "to the alleged defects in the roof and foundation of the premises \* \* \* purchased from one Mitchell."

Appellant also contends, as we understand it, that the trial court in the order of December 17, 1945, erred in vacating the order of June 1, 1944, which had consolidated the law case and the chancery proceedings, because, appellant contends, "actions may be severed only when severance can be done without prejudice to a substantial right; and the court when ordering





a severance, must not abuse its discretionary privilege." It is a sufficient answer to this contention to say that appellant had filed a written demand for a jury trial in the law case and, therefore, that case could not be tried with the chancery proceedings.

After a careful consideration of appellant's contentions we have reached the conclusion that the judgments of the Circuit court of Cook county entered December 17, 1945, and March 13, 1946, should be affirmed and it is accordingly so ordered.

JUDGMENTS ENTERED DECEMBER 17,  
1945, AND MARCH 13, 1946,  
AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

a severance, that not above the circumstances but rather, "It is a sufficient answer to this contention to say that appellant has filed a written demand for a jury trial in the law case and, therefore, that case could not be tried with the summary proceedings."

After a careful consideration of appellant's contentions we have reached the conclusion that the judgments of the Circuit Court of Cook County entered December 11, 1942, and March 13, 1946, should be affirmed and it is accordingly so ordered.

JUDGMENTS ENTERED DECEMBER 11,  
1942, AND MARCH 13, 1946,  
AFFIRMED.

Wright, J., and Sullivan, J., concur.

43911

ELIZABETH SMITH, Appellee,

v.

JOSEPH FINZELBER, DAN GAINES  
and VERNOR ROSE, Appellants.

)  
) APPEAL FROM SUPERIOR  
)  
) COURT OF COOK COUNTY.  
)

95 X  
333 I.A. 645

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Two of the defendants in the above entitled cause, Dan Gaines and Vernor Rose, appeal from a decretal judgment against them in the sum of \$1,509.07 for damages sustained by plaintiff through the violation by them of an injunctional order that had been entered against all of the defendants. The other defendant, Joseph Finzelber, appeals from that part of the same decretal order that assesses and decrees certain costs and charges against him.

On August 26, 1944, plaintiff filed her verified complaint against defendants. Briefly stated, it alleges that on May 25, 1944, defendant Joseph Finzelber owned and operated a tavern located at 6158 Cottage Grove avenue, Chicago, Illinois, known as Campus Inn, and that connected with the tavern and as a part of it there is a kitchen in which food is prepared for sale in the tavern; that on said date Finzelber offered to lease said kitchen and the privilege of dispensing food in the tavern to plaintiff for a period of one year beginning May 31, 1944, and ending May 31, 1945, in consideration of a monthly rental of \$50 and the purchase by plaintiff of the furniture, equipment and supplies that were in said kitchen for the sum of \$115; that on said date plaintiff paid Finzelber the sum of \$115 for the purchase of the kitchen furniture, equipment and supplies, and entered into a lease of said kitchen and the privilege of selling and dispensing food in the tavern, and

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On August 22, 1934, ...

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May 22, 1934, ...  
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privilege of ...

paid Finzelber \$50 as rent for the first month of said lease, which was reduced to writing; that Finzelber procured a license from the City of Chicago to dispense food in said tavern until the 1st day of January, 1945, and paid said City \$54 for said license on May 24, 1944, and that he sold all his right, title and interest in the license to plaintiff for the sum of \$77.25, and gave plaintiff a written receipt for the same; that plaintiff paid Finzelber rent for the month of August, 1944, and invested considerable sums of money for food supplies and labor, and has worked long hours in said kitchen and tavern, cooking and serving food, and as a result of the investment, labor and skill of plaintiff, the patrons of the tavern and the purchasers of food dispensed by plaintiff in the tavern, have greatly increased and the revenue of the tavern greatly increased, and the business of the tavern became lucrative and attractive to prospective purchasers; that Finzelber, taking advantage of the lucrative business developed from the labor and investment of plaintiff, solicited a purchaser for the tavern and Dan Gaines and Vernor Rose purchased the tavern from Finzelber; that they dispute the lease of plaintiff and the ownership by plaintiff of said kitchen and have demanded from her possession of said kitchen and have threatened to eject plaintiff from the premises and to padlock said kitchen and to bar plaintiff from said tavern and kitchen and that unless defendants are restrained and enjoined by a writ of injunction they will bar her from the premises and will take possession of plaintiff's business, kitchen, furniture, equipment and supplies, and will convert the same to their use and profit; that Finzelber has repudiated his sale of the kitchen to plaintiff and has sold or leased the same to Gaines and Rose, and Rose has demanded that plaintiff vacate said kitchen and surrender the furniture,



paid himself \$50 as rent for the first month of said lease, which was refused by writing; that himself proposed a license from the City of Chicago to operate said in said tavern until the 1st day of January, 1942, and paid said City \$10 for said license on May 24, 1941, and that he sold all his rights, title and interest in the license to plaintiff for the sum of \$75.00, and gave plaintiff a written receipt for the same; that plaintiff said himself rent for the month of August, 1941, and invested considerable sum of money for food supplies and labor, and has worked long hours in said kitchen and tavern, cooking and serving food, and as a result of his investment, labor and skill of plaintiff, the volume of the tavern and the proceeds of food dispensed by plaintiff in the tavern, have greatly increased and the revenue of the tavern greatly increased, and the business of the tavern became lucrative and attractive to prospective purchasers; that the law, taking advantage of the prospective business developed from the labor and investment of plaintiff, solicited a purchaser for the tavern and Dan Gains and Vernon Rose purchased the tavern from himself; that they bought the food of plaintiff and the ownership by plaintiff of said kitchen and have transferred from her possession of said kitchen and have transferred to plaintiff from the premises and to himself said kitchen and to her plaintiff from said tavern and kitchen and that the defendants are restrained and enjoined by a bill of injunction they will bar her from the premises and will take possession of plaintiff's business, kitchen, furniture, equipment and supplies, and will convert the same to their use and profit; that himself has repudiated his sale of the kitchen to plaintiff and has sold or leased the same to Gains and Rose, and Rose has demanded that plaintiff vacate said kitchen and surrender the furniture,

equipment and supplies to him and discontinue the operation of said kitchen and the dispensing of food on the premises and has hired a woman to cook and serve food for his benefit and profit. Plaintiff prays that a permanent injunction issue restraining defendants from dispossessing, removing or ejecting her from the tavern and kitchen therein and from interfering with, preventing, limiting or meddling with the operation of said kitchen and the dispensing and sale of food in said tavern by plaintiff and from hiring someone to cook and sell or dispense food in said tavern, and from threatening plaintiff with assault or violence and from taking any of the furniture, equipment, supplies and food in said kitchen and from participating in the preparation and sale of food in said tavern. On September 14, 1944, an injunction was issued restraining defendants as prayed for in the complaint. On September 18, 1944, plaintiff filed, by leave of court, a verified amendment to her complaint, in which she alleges:

"9. Plaintiff depends upon the income of said business for her livelihood and should defendants be permitted to dispossess plaintiff, plaintiff would be without a means of livelihood and would have to wait an indeterminate length of time for an adjudication of a suit for damages or for the eviction of defendants and therefore plaintiff lacks an adequate remedy at law and the rights of plaintiff will be unduly prejudiced and plaintiff will suffer irreparable loss and damage, unless an injunction is issued.

"10. Defendants have interfered with the sale of food by plaintiff in said tavern and with the advertisement of plaintiff in the newspaper and defendants are dispensing food in said tavern and as a consequence of the interference of defendants with the dispensing of food by plaintiff in said tavern, and with the advertisement of plaintiff's business,

equipment and supplies to him and discontinue the operation of said kitchen and the dispensing of food to the residents and has hired a woman to cook and serve food for the benefit and profit. Plaintiff prays that a permanent injunction issue restraining defendants from disseminating, removing or interfering with the tavern and kitchen from in and from interfering with, preventing, limiting or meddling with the operation of said kitchen and the dispensing and sale of food in said tavern by plaintiff and from allowing anyone to cook and sell or dispense food in said tavern, and from threatening plaintiff with assault or violence and from taking any of the premises, equipment, supplies and food in said kitchen and from participating in the preparation and sale of food in said tavern. On September 12, 1944, an injunction was issued restraining the defendants to refrain from in the complaint. On November 12, 1944, plaintiff filed, by leave of court, a verified amendment to her complaint, in which she alleges:

"1. Plaintiff depends upon the income of said business for her livelihood and should therefore be permitted to disseminate plaintiff, plaintiff would be liable to a suit of livelihood and would have to wait an indeterminate length of time for an adjudication of a suit for damages or for the eviction of defendants and therefore plaintiff seeks an immediate remedy at law and the rights of plaintiff will be unduly prejudiced and plaintiff will suffer irreparable loss and damage, unless an injunction is issued.

"2. Defendants have interfered with the sale of food by plaintiff in said tavern and with the advertisement of plaintiff in the newspaper and defendants are disseminating food in said tavern and as a consequence of the interference of defendants with the dispensing of food by plaintiff in said tavern, and with the advertisement of plaintiff's business.

the business of plaintiff has decreased and plaintiff has suffered loss and damage.

"11. Plaintiff prays that damages be allowed plaintiff for the interference by defendants with the operation and maintenance of said business by plaintiff, and that plaintiff be granted such other and further relief as the Court may deem proper and necessary."

After answers were filed by defendants an order was entered referring the cause to a master in chancery to take proofs and report his conclusions and recommendations to the court. On December 13, 1944, plaintiff filed a verified petition in which she charged defendants with violating the injunctive order. On December 14, 1944, the chancellor entered an order granting leave to plaintiff to file her petition for a rule and ordering defendants to answer the same within ten days and that they show cause why they should not be held in contempt of court for violation of the injunction, and the matter of the petition and the rule entered were referred to the master for hearing and the master was ordered to include in his report to the chancellor upon the reference that had been theretofore made his conclusions and recommendations upon the said petition. On March 3, 1945, defendants Gaines and Rose filed an amended counterclaim against Finzelber for damages for alleged breach of contract and warranty. The master, after hearing the evidence offered, filed a report in which he made certain findings and recommended, inter alia:

"(1) That the complaint of the plaintiff, Elizabeth Smith, against the defendant, Joseph Finzelber, be dismissed for want of equity.

"(2) That judgment for damages be entered against the defendants, Daniel Gaines and Vernon Rose, in favor of the



the business of plaintiff has decreased and plaintiff has  
incurred loss and damage.

"11. Plaintiff prays that damages be allowed plaintiff  
for the interference by defendants with the operation and con-  
tinuance of said business by plaintiff, and that plaintiff be  
granted such other and further relief as the court may deem  
proper and necessary."

After answers were filed by defendants an order was  
entered requiring the case to a master in chambers to take  
proof and report his conclusions and recommendations to the  
court. On December 12, 1944, plaintiff filed a verified peti-  
tion in which she charged defendants with violation of the in-  
junctional order. On December 14, 1944, the master filed an order  
granting leave to plaintiff to file her petition for a  
rule and ordering defendants to answer the same within ten days  
and that they show cause why they should not be held in contempt  
of court for violation of the injunction, and the master of the  
petition and the rule ordered were referred to the master for  
hearing and the master was ordered to include in his report to  
the chancellor upon the answers that had been forwarded with  
his conclusions and recommendations upon the said petition. On

March 3, 1945, defendants again and once filed an amended  
counterclaim against plaintiff for damages for alleged breach  
of contract and warranty. The matter, after hearing the evi-  
dence offered, filed a report in which he made certain findings  
and recommendations, filed with:

- "(1) That the complaint of the plaintiff, Elizabeth  
Smith, against the defendant, Joseph Alexander, be dismissed  
for want of equity.  
"(2) That judgment for damages be entered against the  
defendants, Daniel Cairns and Arthur Ross, in favor of the



plaintiff, Elizabeth Smith, in the amount of \$2,150, as and for her damages caused by the violation, by the said defendants, of the Writ of Injunction of this court.

"(3) That the counter-claim of the counter-plaintiffs, Daniel Gaines and Vernon Rose, against the defendant, Joseph Finzelber be dismissed for want of evidence to establish recoverable damage caused to the said counter-plaintiffs by the said defendant.

"(4) That the goods and chattels formerly located and used in the Campus Inn, at 6158 Cottage Grove Avenue, Chicago, Illinois, including the furniture, fixtures, furnishings and fixtures of the kitchen and dining room thereof, which were conveyed to said Daniel Gaines and Vernon Rose by Joseph Finzelber by his Bill of Sale bearing date August 22, 1945, be decreed to be the property of the defendants and counter-plaintiffs, Daniel Gaines and Vernon Rose."

The following is the decree entered by the chancellor:

"The Report of the Master in Chancery \* \* \* and the exceptions of Elizabeth Smith and Dan Gaines and Vernor Rose thereto, coming on to be heard, and it appearing to the Court that the parties hereto are represented by their respective attorneys and the Court having heard the arguments of counsel, doth find, that it has jurisdiction of said master's report and of the exceptions thereto, and of the parties hereto.

"It is ordered that the exceptions of Elizabeth Smith Numbers 6, 8, 9, 10, 11, 12, 14 and 19, be sustained.

"The Court finds that the master erred as follows, to-wit:

"1. The Master erred in not assessing all of the Master's fees and stenographers charges against Joseph Finzelber, Dan Gaines and Vernor Rose.

"2. The Master erred in finding that the receipt of

plaintiff, Elizabeth Smith, in the amount of \$1,100, as damages caused by the violation, by the said defendant, of the writ of injunction of this court.

"(3) That the counter-claim of the counter-defendant, Daniel Gaines and Vernon Rose, against the defendant, Joseph Kinship, be dismissed for want of evidence to establish recoverable damages caused to the said counter-defendant by the said defendant.

"(4) That the goods and chattels lawfully located and used in the Campus Inn, at 6125 Cottage Grove Avenue, Chicago, Illinois, including the furniture, fixtures, furnishings and fixtures of the kitchen and dining room thereof, which were conveyed to said Daniel Gaines and Vernon Rose by Joseph Kinship by his Will of date bearing date August 10, 1942, be deemed to be the property of the defendant and counter-defendant, Daniel Gaines and Vernon Rose."

The following is the answer entered by the counter-defendant:

"The Report of the Master in Chancery is as follows:

exceptions of Elizabeth Smith and her heirs and Vernon Rose thereto, coming on to be heard, and it appeared to the court that the parties hereto are represented by their respective attorneys and the court having heard the arguments of counsel, both find, that it has jurisdiction of said master's report, and of the exceptions thereto, and of the parties hereto.

"It is ordered that the exceptions of Elizabeth Smith and Vernon Rose be overruled.

Paragraphs 6, 8, 9, 10, 11, 12, 14 and 15, be sustained.

"The Court finds that the master erred as follows:

to-wit:

- "1. The master erred in not assessing all of the master's fees and attorneys' charges against Joseph Kinship, Daniel Gaines and Vernon Rose.
- "2. The master erred in finding that the receipt of

Joseph Finzelber is not enforceable as a lease or irrevocable contract for a period of one year beginning May 31, 1944.

"3. The Master erred in finding that 'Plaintiff's Exhibit 5,' was altered by plaintiff without the knowledge of or consent of Joseph Finzelber.

"4. The Master erred in finding that a lease is barred by the Statute of Frauds.

"5. The Master erred in finding that plaintiff did not have a right to possession of the kitchen and use of the tavern and dining room for the period of one year from May 31, 1944 and that plaintiff was not a tenant of the kitchen.

"6. The Master erred in finding that plaintiff had a license in the dining room and kitchen which were revocable and was terminated by Joseph Finzelber and in recommending that the complaint be dismissed against Joseph Finzelber for want of equity.

"7. The Master erred in not recommending that the prayer of the Complaint of Elizabeth Smith, be granted and that a decree be entered in accordance with said prayer and that defendant be assessed damages in the sum of \$1,509.07.

"The Court also finds:

"8. The issues in favor of plaintiff, Elizabeth Smith and against all of said defendants.

"9. That on May 25, 1944, the defendant, Joseph Finzelber, owned and operated, at 6158 Cottage Grove Avenue, Chicago, Illinois, a tavern known as 'Campus Inn' and connected with and a part of said tavern was a kitchen, in which food was prepared for sale in said tavern.

"10. That on said May 25, 1944, it was agreed between Elizabeth Smith, the plaintiff and Joseph Finzelber defendant herein, that said plaintiff should have the privilege of selling and dispensing food in said tavern and dining room for





a period of one year, beginning May 31, 1944 and ending May 31, 1945.

"11. That on said May 25, 1944, Elizabeth Smith, plaintiff paid Joseph Finzelber, defendant herein, the sum of \$50 rent for the kitchen for the month ending June 24, 1944, and it was agreed between the said Elizabeth Smith and Joseph Finzelber, that Elizabeth Smith should have possession of said kitchen for one year beginning May 31, 1944 and ending May 31, 1945, provided said rent was paid each month.

"12. That on May 24, 1944, the defendant, Joseph Finzelber made application to the City of Chicago, Illinois, for a Food Dispenser License for aforesaid premises at 6158 Cottage Grove Avenue, and on June 22, 1944, Food Dispenser License No. 7079 of the City of Chicago was issued, wherein and whereby said defendant, Joseph Finzelber was given permission to conduct or operate the business of Food Dispenser at aforesaid address until January 1, 1945, for which said Food Dispenser License said defendant, Joseph Finzelber paid to the City of Chicago the sum of \$77.25.

"13. Thereafter, the defendant, Joseph Finzelber received from the plaintiff, Elizabeth Smith, the sum of \$77.25, for which sum he purported to sell or convey to her, aforesaid Food Dispenser License, as evidenced by the following receipt, in evidence as Plaintiff's Exhibit 6 of October 17, 1944:

'Recved of E. Smith \$77.25 for License of Resterent  
from Campus Inn for 6 mo

'Joe Finzelber'

which said license was delivered by the defendant, Joseph Finzelber to the plaintiff, Elizabeth Smith, on or about July 23, 1944.

"14. That on or about May 26, 1945<sup>[1944]</sup>, the plaintiff, Elizabeth Smith, entered into possession of the kitchen and dining room of aforesaid Campus Inn and thereafter operated



a period of one year, beginning May 15, 1944 and ending May 15, 1945.

"11. That on said May 15, 1944, Elizabeth Smith,

defendant herein, the son of 1929 went for the license for the month ending June 15, 1944 and it was agreed between the said Elizabeth Smith and Joseph Alexander, that Alexander should have possession of said license for one year beginning May 15, 1944 and ending May 15, 1945, provided said year was paid each month.

"12. That on May 15, 1944, the defendant, Joseph

Alexander was application to the City of Chicago, Illinois, for a food dispensing license for Alexander's premises at 4117 Cottage Grove Street, apt. on June 15, 1944, when Alexander the said May 15, 1944 of the City of Chicago was issued, and money was paid, license, Alexander was given money in the amount of \$100.00 for the license for the month ending June 15, 1944, for which said food dispensing license was paid Alexander, Joseph Alexander paid to the City of Chicago the sum of \$75.00.

"13. Thereafter, the defendant, Joseph Alexander re-

ceived from the Chicago, Illinois, the sum of \$75.00 for which sum he was supposed to sell or deliver to the food dispensing business, as evidenced by the following receipt:

Received of J. Alexander \$75.00 for license of defendant Joseph Alexander for the month ending June 15, 1944.

which said license was delivered to the defendant, Joseph Alexander on or about May 15, 1944, on or about May 15, 1944, Elizabeth Smith, on or about May 15, 1944, entered into possession of the license and dining room of Alexander's Chicago Inn and thereafter operated

said kitchen and dining room and prepared and served food in the tavern and dining room appurtenant to said Campus Inn; said food so prepared and served by her was purchased by her with her own funds, and payment therefor from the customers to which the same was served was collected and received by her for her own account.

"15. That during the months of June, July and August, 1944, the plaintiff, Elizabeth Smith paid to the defendant, Joseph Finzelber compensation for the use and occupation of said kitchen and dining room for said months; said compensation for the month of June was the sum of \$50.00 and said compensation for the months of July and August was, by agreement of the Parties, increased to \$75.00 per month to defray a part of the expenses of light and janitor service.

"16. In addition to aforesaid compensation for use and occupation of said premises, the plaintiff, Elizabeth Smith expended the following sums for cleaning, maintenance and repair of said premises and of equipment appurtenant thereto:

"May 26, 1944	To Leo Jackson for cleaning and painting the kitchen . . . . .	\$25.00
"July 19, 1944	To People's Gas Light and Coke Company, Service Deposit . . . . .	25.00
"June 4, 1944	To R. J. Cooper, Jr., Inc., for repairs to kitchen refrigerator	5.93
"August 3, 1944	To C. J. Plate for refrigeration service . . . . .	<u>3.00</u>
	"Total . . . . .	\$58.93

"17. During aforesaid months, the plaintiff, Elizabeth Smith paid the charges for rental of table and other linen in connection with the preparation and service of said food and employed and paid for the services of a waitress, a cook and a dishwasher, necessary and incident thereto.

"18. During aforesaid months of June, July and August,

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17. During 1954-55, the following was the result of the investigation into the connection with the preparation and service of food and employed and paid for the service of a waitress, a cook and a fish-woman, respectively, in the restaurant.

"I'm, having a good time of it, and I'm

1944, advertisements were regularly published in The Chicago Defender of the premises and business at 6158 Cottage Grove Avenue, under the designation of 'Joe's Campus Inn,' which said advertisement contained, among other things, the words:

"Try Elizabeth Smith's Regular Home-Cooked Dinners  
Steaks and Fried Chicken  
We Cater to Clubs and Parties in the 'Campus Inn'  
Dining Room  
Elizabeth Smith, Prop.

One-half of the cost of said advertisement, being the sum of \$8.50 for each insertion, was paid by the plaintiff, Elizabeth Smith and the other one-half thereof was paid by the defendant, Joseph Finzelber, said advertisement last appeared in the edition of said The Chicago Defender published on August 19, 1944, and was thereafter discontinued by order of the defendant, Joseph Finzelber.

"19. Subsequently thereto, beginning on September 23, 1944 and in the four successive issues of said The Chicago Defender, the plaintiff, Elizabeth Smith caused to be published her separate advertisement of the business conducted by her at aforesaid address and premises.

"20. On August 21, 1944, the defendant, Joseph Finzelber, entered into an agreement with the defendants, Dan Gaines and Vernor Rose, wherein and whereby said Joseph Finzelber agreed to sell to said Daniel Gaines and Vernor Rose, the said business conducted by said Joseph Finzelber at 6158 South Cottage Grove Avenue, Chicago, Illinois, including all goods, wares, merchandise, stock in trade, bottled liquors, both opened and unopened and all furniture, fixtures and personal property contained in said establishment together with the good will of said business, and in and by which said agreement said Joseph Finzelber warranted that he was the sole and unconditional owner of all of the assets therein described and that there were no liens or encumbrances

1941, approximately two months prior to the outbreak of the epidemic, the following was observed in the laboratory of the University of California at Berkeley, California, under the supervision of Dr. J. H. Hensley, Jr., who was at that time a member of the faculty of the University of California at Berkeley, California. The following is a summary of the results of the investigation:

One-half of the total of 100 specimens, being the same as those for which the results were given by the University of California at Berkeley, California, were the same as those for which the results were given by the University of California at Berkeley, California. The results of the investigation of the specimens of the University of California at Berkeley, California, were the same as those for which the results were given by the University of California at Berkeley, California.

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against any of said assets.

"21. On August 22, 1944, the defendant, Joseph Finzelber, executed and delivered to the defendants, Daniel Gaines and Vernor Rose, his Bill of Sale, wherein and whereby he granted, bargained and sold to said last named defendants the goods, chattels and property on said premises, which said goods, chattels and property included the furniture, fixtures and equipment of the kitchen and dining room thereof; and said Joseph Finzelber also executed and delivered to said Daniel Gaines and Vernor Rose, his Vendor's Sworn Statement of Creditors under the Bulk Sales Law of the State of Illinois, in which said sworn statement, said Joseph Finzelber stated that he had no creditors.

"22. On or about August 21, 1944, the defendant, Joseph Finzelber, notified the plaintiff, Elizabeth Smith, of the impending change of ownership of said premises and tendered to her a refund of the unearned portion of the compensation for use and occupation thereof which she had paid for the month of August, whereupon the said plaintiff, Elizabeth Smith refused to receive or accept the same.

"23. On or about August 22, 1944, the defendants, <sup>Gaines</sup> Daniel and Vernor Rose, or one of them, made verbal demand upon the plaintiff, Elizabeth Smith, that she vacate and turn over to the said defendants absolute possession of the said premises, whereupon said plaintiff refused so to vacate or to turn over such absolute possession.

"24. The plaintiff, Elizabeth Smith, thereupon continued to occupy said kitchen and dining room of said premises and to prepare and serve meals there until December 9, 1944, when said kitchen and dining room were closed by order of the defendant, Vernor Rose.

...of said ...

"11. On August 24, 1944, the defendant, James ...

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"25. On September 2, 1944, the plaintiff, Elizabeth Smith, tendered to the defendant, Joseph Finzelber, money Orders Numbered 190913 and 190914, respectively, Money Order No. 190913 being for the sum of \$50.00 tendered for rent of concession at 6158 Cottage Grove Avenue and Money order No. 190914 being for the sum of \$10.00 tendered for light at 6158 Cottage Grove concession, which said tenders were refused by the defendant, Joseph Finzelber and said money orders were by him returned to the plaintiff.

"26. On August 28, 1944, the plaintiff, Elizabeth Smith, filed her complaint herein, in which said complaint, she prayed, among other things, that a permanent injunction of this Court issue restraining the defendants, Joseph Finzelber, Dan Gaines and Vernor Rose, from dispossessing, removing or ejecting said defendant from aforesaid tavern and kitchen and from interfering with, preventing, limiting or meddling with the operation of said kitchen and the dispensing and sale of food in said tavern by plaintiff.

"27. On September 14, 1944, an order was duly entered by this Court in accordance with the prayer of aforesaid complaint of the plaintiff, Elizabeth Smith, and the Writ of Injunction of this Court issued in accordance therewith, which said order of court and Writ of Injunction are still in full force and effect, never having been dismissed, rescinded, altered or modified in any manner whatsoever.

"28. Subsequent to said September 14 defendants, Dan Gaines and Vernor Rose, or one of them, on divers occasions, interfered with the plaintiff, Elizabeth Smith, in her operation of said kitchen and the dispensing and sale of food in said tavern, by permitting the dining room of said tavern to be used for club meetings, at which no food was ordered, during the





hours when the said plaintiff was accustomed to serve food therein to her customers, which said club meetings greatly annoyed the customers of the plaintiff and caused them to complain to her and to leave said dining room, and the said defendants, Dan Gaines and Vernor Rose, or one of them, also interfered with the exclusive right of the plaintiff to serve food in said tavern by procuring from outside sources, food which was brought to said tavern and served therein, and for which the said plaintiff received no compensation.

"29. On December 9, 1944, at or about the hour of three o'clock P.M., the employees of the defendant Vernor Rose, then and there in charge of said tavern notified the plaintiff, Elizabeth Smith, that the said defendant had given orders to said employees to turn out the lights in the dining room, where the plaintiff dispensed and sold food, and to inform customers of the plaintiff and patrons of said tavern that food could not be dispensed or sold by the plaintiff in said tavern and dining room; and as a result of said orders, said employees of said defendant, then and there in charge and control of said tavern, informed patrons of plaintiff and of said tavern that plaintiff could not sell food in said tavern, said employees, at or about the hour of eight o'clock P.M. on said December 9, 1944, turned out the lights in said dining room, and prospective customers of said plaintiff thereupon left said tavern and ceased purchasing food from the plaintiff.

"30. After the said December 9, 1944, said defendant, Vernor Rose, as the agent in charge of said premises of himself and defendant, Daniel Gaines, kept said premises locked and the plaintiff, Elizabeth Smith was unable to get into said kitchen until December 12, 1944, to make adjustments to the refrigeration system necessary to insure its operation, by reason of which meats and other perishable food supplies in the kitchen





and refrigerator at the time said premises were closed on said December 9, 1944, were spoiled and were of no further use and the said plaintiff was obliged to discard them.

"31. The fair market value of the food supplies so spoiled, and the cost of the same to the plaintiff, is the sum of \$133.25.

"32. Since said December 9, 1944, the plaintiff, Elizabeth Smith, has been wholly barred and prevented by the said defendants, Daniel Gaines and Vernor Rose, from the use and occupation of said kitchen and dining room for the purpose of preparing and serving of food therein, whereby the said plaintiff has been wholly deprived of any earnings or profits whatsoever from such preparation and service of food on said premises.

"33. The average net earnings or profits of the plaintiff, Elizabeth Smith, after the deduction of expenses, prior to December 9, 1944, amounted to \$250.15 per month, and the damages sustained by Elizabeth Smith by reason of the interference of defendants with her use of the kitchen and dining room between December 9, 1944, and May 25, 1945, caused by the deliberate and wilful violation of the injunction of this Court by defendants, in which Vernor Rose locked said Elizabeth Smith out of the dining room and kitchen, and refused to allow her to use the kitchen and to serve food in the dining room, after December 9, 1944 for a period of five and one half months @ \$250.15 per month and an additional sum of \$133.25 for food supplies that spoiled in December, 1944, making a total damage of \$1,509.07 sustained by plaintiff.

"34. That after the eviction of the plaintiff, Elizabeth Smith, on December 9, 1944, as aforesaid, the defendants and counter-claimants, Daniel Gaines and Vernor Rose, retained the furniture, fixtures, furnishings and equipment of said tavern

and investigator as the last date received was dated on 1944, were specified and sent of an interest was not. The said liability was assigned to the same date.

"11. The said liability of the two companies was specified, and the date of the said liability, as per the of 1944.

"12. The said liability, as per the of 1944, was specified, and the date of the said liability, as per the of 1944.

"13. The said liability, as per the of 1944, was specified, and the date of the said liability, as per the of 1944.

"14. The said liability, as per the of 1944, was specified, and the date of the said liability, as per the of 1944.

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"16. The said liability, as per the of 1944, was specified, and the date of the said liability, as per the of 1944.

"17. The said liability, as per the of 1944, was specified, and the date of the said liability, as per the of 1944.

"18. The said liability, as per the of 1944, was specified, and the date of the said liability, as per the of 1944.

"19. The said liability, as per the of 1944, was specified, and the date of the said liability, as per the of 1944.

"20. The said liability, as per the of 1944, was specified, and the date of the said liability, as per the of 1944.

on the premises thereof, but did not operate said kitchen and dining room for preparation and service of food, until on or about May 10, 1945, upon which said date the said defendants and counter-claimants removed all of said furniture, fixtures, furnishings and equipment from said tavern and placed the same in public storage in the warehouse of Grove Storage Co., Inc., at 4301-3 Cottage Grove Avenue, Chicago, Illinois.

"35. The sale of goods from the defendant, Joseph Finzelber to the plaintiff, Elizabeth Smith, evidenced by the defendant's receipt of the sum of \$100.00 in evidence as Plaintiff's Exhibit 4, included only the stock of groceries and canned goods on hand at the tavern for use in the kitchen at the time the receipt was executed, and did not include the furniture, fixtures, furnishings and equipment of the kitchen and dining room, or of either, therefore the plaintiff, Elizabeth Smith, acquired no right, title or interest in or to said furniture, fixtures, furnishings and equipment thereunder.

"36. The defendants, Daniel Gaines and Vernor Rose, have ignored, violated and rendered ineffective the Writ of Injunction issued by this Court in accordance with its order entered herein on September 14, 1944, by interfering with, preventing, limiting and meddling with the operation of said kitchen and the dispensing and sale of food in said dining room and tavern by the plaintiff and by wholly excluding her <sup>from</sup> therefrom/and after December 9, 1944.

"37. The defendants, Daniel Gaines and Vernor Rose, are, therefore, in contempt of this Court for aforesaid violation of its Writ of Injunction and are, jointly and severally liable to the plaintiff, Elizabeth Smith, for any and all

on the premises thereof, but did not remove said kitchen  
and dining room for preparation and service of food, until

on or about May 12, 1944, upon which date the said

defendants and second-defendant removed all of said kitchen  
and dining room, including and including the said dining

and dining room, and in furtherance of the same removed the

same to the city of Chicago, Illinois, and thereupon

Chicago, Illinois.

"33. The sale of goods from the defendant, named

defendant on the plaintiff, defendant, named, and the

defendant named, of the city of Chicago, Illinois, and

defendant named, of the city of Chicago, Illinois, and

and dining room on May 12, 1944, and on the same date

at the time the defendant and defendant, and at the time the

defendant, defendant, defendant, and defendant, of the city of

and dining room, of either, defendant, the defendant,

defendant named, defendant named, and at the time the

to the defendant, defendant, defendant, and defendant,

defendant.

"34. The defendant, named, defendant, and defendant,

have removed, defendant, defendant, defendant, and defendant, and

injection taken on May 12, 1944, in defendant, and in

defendant named on defendant, of the city of Chicago, Illinois, and

defendant, defendant, defendant, and defendant, and the defendant of the

kitchen and the defendant and the defendant in the defendant

room and taken by the plaintiff and by the defendant named

defendant, of the city of Chicago, Illinois, and

"35. The defendant, named, defendant, and defendant,

and, defendant, in defendant of the city of Chicago, Illinois, and

defendant of the city of Chicago, Illinois, and defendant, and defendant,

defendant to the plaintiff, defendant named, and the defendant



damage sustained by her by reason of aforesaid acts of contempt.

"38. It was therefore, Ordered, Adjudged and Decreed that judgment be and the same is hereby entered against the defendants, Daniel Gaines and Vernor Rose, and in favor of the plaintiff, Elizabeth Smith, in the sum of \$1,509.07 and costs, as and for damages caused by the violation, by the said defendants, of the Writ of Injunction of this Court and her rights in the premises, and that execution issue forthwith for said judgment and the costs herein, against Daniel Gaines and Vernor Rose.

"39. It is further Ordered, Adjudged and Decreed that the Master's certificate of Service, fees and charges, in the amount of \$459.92 be and the same is hereby approved and taxed as costs, and assessed against defendants Joseph Finzelber, Daniel Gaines and Vernor Rose.

"40. It is further Ordered, Adjudged and Decreed that the charges of the stenographer who took and transcribed the testimony before the Master herein be and the same is hereby approved in the amount of \$188.50 and taxed as costs herein and assessed against defendants, Joseph Finzelber, Daniel Gaines and Vernor Rose.

"41. It is further Ordered, Adjudged and Decreed that the sum of \$150, deposited with the Master by plaintiff, be refunded to plaintiff out of the Master's share of the costs collected from defendants.

"42. It is further Ordered, Adjudged and Decreed that the costs assessed, be added to the statutory costs allowed plaintiff on said judgment and the special execution issue, against Joseph Finzelber for all of said costs."

It will be noted that the chancellor did not punish

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the costs associated, he cited as the starting point allowed

On 11/11/1964, the following information was received from the Bureau of the Census:

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It will be noted that the channel is not paved

Gaines and Rose for their violations of the injunctive order, and that he failed to pass upon the recommendation of the master that the counterclaim of Gaines and Rose against Finzelber should be dismissed. However, Gaines and Rose make no complaint as to said failure and they now join with Finzelber in the instant appeal, in which all of the defendants ask that the decree be reversed in toto.

Defendants contend that there is no law to justify the action of the chancellor in entering judgment against Gaines and Rose to indemnify plaintiff for the damages she sustained by reason of the alleged violation of the injunction order by said defendants. In support of this contention defendants cite Barnes v. Typographical Union, 232 Ill. 402, which has no application to the instant proceeding. There the defendant, after a hearing upon a rule to show cause, was found guilty and fined \$1,000 for contempt of court for violating the injunction. In the order imposing the fine the appellant Union was ordered to pay the fine to the clerk of the court and it was further ordered that if such payment should not be made execution should issue for the collection of the fine in the name of the People "for the use of the appellees." It was held that the execution was not in proper form, as "there is no statute in this State which authorizes the appropriation of a fine imposed for a contempt of court, to the party injured by the act constituting the contempt or who prosecutes the proceeding for the contempt," (p. 411) and it was ordered that the words, "for the use of the appellees" be stricken from the judgment order. As stated in the dissenting opinion (p. 412): "The form of the execution awarded by the order indicates that the purpose of the superior court was to indemnify the appellees, although the law of this State does not warrant that course \* \* \*." In Bayer v. Bloch, 246 Ill. App. 416, we stated (pp. 423, 424): "In 14 R.C.L. p.

United States and loss for their violation of the international order, and that he failed to pass upon the recommendation of the court that the recommendation of United States and loss should be dismissed. However, United States and loss should be dismissed as to said claims and they now claim that in the instant appeal, in which all of the defendants are that the defense be reversed in toto.

Defendants contend that there is no law to justify the action of the defendant in entering judgment against United States and loss to indemnify plaintiff for the damages and expenses by reason of the alleged violation of the international order by said defendants. In support of this contention defendants cite United States v. International Union, 221 Ill. 401, which has no relation to the instant proceeding. There are defendant, after a hearing upon a writ to show cause, was found guilty and fined \$1,000 for contempt of court for violating the injunction. In the order imposing the fine the appellant claims was ordered to pay the fine to the clerk of the court and it was further held that if such payment should not be made immediately should issue for the collection of the fine in the name of the People of the State of Illinois. It was held that the commission was not in proper form, as "there is no statute in this state which authorizes the appointment of a fine imposed for a contempt of court, to the party injured by the act constituting the contempt or the prosecutor the proceeding for the contempt." (p. 411) and it was ordered that the words, "for the use of the appellant" be stricken from the judgment order. It stated in the dissenting opinion (p. 411): "The form of the commission awarded by the order indicates that the purpose of the appellant court was to indemnify the applicant, although the law of this state does not warrant that course." In United States v. International Union, 221 Ill. 401, we stated (p. 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).



322, par. 21, the author says: 'It is a well settled and a familiar rule, applicable in proceedings to obtain an injunction, that when a court of equity acquires jurisdiction of a cause for one purpose, it may retain it generally. \* \* \* The purpose of such retention is to enable the court to do complete justice between the parties. It may, therefore, retain the cause for the purpose of ascertaining and awarding the apparent damages, as something which is incidental to the main relief sought.' And again the author says (p. 457, par. 157): 'Therefore, as incident to the relief by injunction against a continuing trespass, the court may, in a proper case, consider and settle the question of damages. \* \* \* The party entitled to damages may waive them, if he chooses, by not furnishing evidence to enable the court to measure them in money, which is an advantage to the defendant, but does not defeat the action.' (Citing Garvey v. Long Island R. Co., 159 N. Y. 323, 332.) In American Hide & Leather Co. v. Anderson, 153 Ill. App. 79, 81, it is said: 'Though a court of equity would have no jurisdiction to decree only payment of damages for past trespasses, yet if it obtain jurisdiction in order to enjoin the repetition of the trespasses, it may determine the damages for past wrongs and decree their payment instead of relegating the parties to a court of law for this relief.' (Citing Keith v. Henkleman, 173 Ill. 137.)" (See, also, Deeds v. Gilmer, (Va.) 174 S.E. 37, 79.) The instant contention is clearly an afterthought. Neither by pleading nor by any other method did defendants during the proceedings in the trial court question the right of plaintiff to recover damages if she sustained damages as a result of a violation by defendants of the injunction. Their entire defense was based upon the assumption that plaintiff had such a right but that they did



523, par. 11, the author says: 'It is a well settled rule of family law, applicable in proceedings for divorce or separation, that when a court of equity exercises jurisdiction of a case for one purpose, it may retain it thereafter, for the purpose of such retention is to enable the court to do justice between the parties. It may, therefore, retain the matter for the purpose of ascertaining the meaning of apparent language, as something which is immaterial to the main relief sought.' and again the author says (p. 67, par. 17): 'Therefore, as incident to the relief by injunction against continuing trespass, the court may, in a proper case, consider and settle the question of damages, if the party entitled to damages may give them, if he chooses, by not forbidding evidence to enable the court to measure them in money, when it is satisfied to the defendant, and does not object to action.' (Citing Carvey v. Lord [1892] 1 Q.B. 113, 114, 115.) In Carvey v. Lord [1892] 1 Q.B. 113, 114, 115, it is said: 'Though a court of equity would give no jurisdiction to decree any payment of damages for past trespasses, yet if it obtain jurisdiction in order to enforce the cessation of the trespasses, it may award the damages for past trespasses and award such payment instead of forbidding the parties to a court of law for this relief.' (Citing Carvey v. Lord [1892] 1 Q.B. 113, 114, 115.) Also, Carvey v. Lord [1892] 1 Q.B. 113, 114, 115. The English Court of Appeal in Carvey v. Lord [1892] 1 Q.B. 113, 114, 115, was divided 3-2, whether by giving now by any other method his defendants during the proceedings in the trial court question the right of plaintiff to recover damages in the event of a violation by defendant of the injunction. Their entire defense was based upon the assumption that plaintiff had such a right but that they did

not violate the injunction and therefore there was no merit in her claim.

Defendants contend that plaintiff's Exhibit 5, upon which she primarily based her claim that the relationship of landlord and tenant existed between Finzelber and plaintiff, was materially altered by plaintiff without the express or implied consent of Finzelber and that therefore such alteration destroyed the instrument as a legal obligation regardless of whether her intent in altering the instrument was fraudulent or not. The chancellor found that "The Master erred in finding that 'Plaintiff's Exhibit 5,' was altered by plaintiff without the knowledge of or consent of Joseph Finzelber," and we are in accord with that finding. Defendants also contend that plaintiff's Exhibit 5 amounted to a mere license but that it did not amount to a lease and did not create the relationship of landlord and tenant between Finzelber and plaintiff. We are in accord with the finding of the chancellor that "The Master erred in finding that the receipt of Joseph Finzelber is not enforceable as a lease or irrevocable contract for a period of one year beginning May 31, 1944." Defendants Gaines and Rose join in the instant contention. It appears from the following that they have changed their position as to the relationship that existed between plaintiff and Finzelber: In their amended counterclaim against Finzelber for damages in the amount of \$10,000 for alleged breach of contract and warranty they alleged: "5. That the defendant, Joe Finzelber, has failed and neglected to perform said agreement in that he failed to deliver the property set forth in Exhibit 'B' under the title of kitchen to the counter-plaintiffs and has failed to let the counter-plaintiffs into possession of the premises as agreed; that

not violate the injunction and therefore there was no violation in her claim.

Defendants contend that plaintiff's conduct is proper

which she properly based her claim that the relationship of landlord and tenant existed between them from the date of the purchase of the premises by plaintiff.

On implied consent of defendant and that defendant's

alteration destroyed the instrument as a legal obligation

regardless of whether her intent in altering the instrument

was fraudulent or not. The Chancellor found that the matter was fraudulent in finding that plaintiff's conduct was intended to

plaintiff about the execution of the instrument of conveyance.

Plaintiff, and we are in accord with the finding, that

also contend that plaintiff's conduct is intended to a

same license but that it did not amount to a lease and did

not create the relationship of landlord and tenant between

plaintiff and defendant. The law is against the finding

of the Chancellor that "the matter was intended to create the

relationship of landlord and tenant as a lease or

irrevocable contract for a period of one year beginning May

31, 1944." Defendants claim and base their claim on

contract. It appears from the evidence that they have

assigned their position as to the relationship that existed

between plaintiff and defendant. In their amended complaint

against defendant for damages in the amount of \$10,000, they

alleged breach of contract and recovery of damages of \$10,000.

That the defendant, Joe Finkler, was willing and obligated

to perform said agreement in that he failed to deliver the

property set forth in Exhibit A, under the title of witness

to the counter-plaintiffs and was called to law the common-

plaintiff into possession of the premises as a leasehold that

the defendant, Joe Finzelber, unknown to the counterplaintiffs, and prior to his agreement with the counter-plaintiffs, had, either sold the equipment in the kitchen and leased the kitchen and dining room, in the premises at 6158 Cottage Grove Avenue, Chicago, Illinois, to Elizabeth Smith, plaintiff in the instant suit, or, had leased the equipment in the kitchen and the use of the dining room in the premises to Elizabeth Smith, aforesaid, which acts of Joe Finzelber, defendant, have deprived the counter-plaintiffs of the property which they purchased and the use of the premises." Both Gaines and Rose filed an affidavit in support of their counterclaim in which they averred that they "know the contents thereof and that the same is true in fact and in substance." It is a reasonable inference from the record that Gaines and Rose have settled their differences with Finzelber and that the three defendants are now united in opposing the claim of plaintiff. In answer to the instant contention it is only necessary to cite the case upon which defendants rely to support their instant contention, City of Berwyn v. Berglund, 255 Ill. 498. The court states therein (pp. 500, 501): "A license is a mere personal and revocable privilege to do an act or a series of acts upon the land of another without possessing any interest or estate in the land, and it is not within the Statute of Frauds. \* \* \* Whether an instrument is a license or grant depends upon the construction of the instrument as a question of law. If it merely confers a privilege to do an act or a series of acts under the owner which without permission would be unlawful, it is a license, but if it grants exclusive possession of premises against the world, including the owner, it is not a license but creates an estate or interest in the land, and is no more revocable than any other grant."







The chancellor was justified in finding that Finzelber did not retain possession and control of the dining room and kitchen; that he openly and repeatedly stated that he did not have any control of the kitchen and the food; that he charged plaintiff extra for the light and for the cleaning of the dining room and kitchen; that plaintiff kept the kitchen locked and had full and complete possession of it, and that plaintiff paid Finzelber monthly rent for the kitchen. Furthermore, her rent was paid to August 30, 1944, and even if she could be considered merely as a month to month tenant, to terminate her tenancy it would be necessary to give her a thirty days' written notice, and it is not claimed that any such notice was given.

Defendants next contend that plaintiff failed to sustain the burden of proving that defendants Gaines and Rose violated the injunction. We are in accord with the finding of the chancellor that since December 9, 1944, plaintiff "has been wholly barred and prevented by the said defendants, Daniel Gaines and Vernor Rose, from the use and occupation of said kitchen and dining room for the purpose of preparing and serving of food therein."

We are satisfied that the experienced chancellor who tried this case was justified in concluding that all of the equities were with plaintiff. It is a reasonable inference that he failed to punish defendants for their violation of the injunctional order upon the assumption that they would thereby be more likely to pay plaintiff the damages assessed against them, but defendants do not seem to appreciate the forbearance of the chancellor. The master recommended that damages be assessed against Gaines and Rose in the amount of \$2,150. The chancellor fixed the damages at \$1,509.07.



It is our considered judgment that there is no merit in defendants' contention that the decretal judgment should be reversed, and, therefore, the decretal judgment of the Superior court of Cook county is affirmed.

DECRETAL JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

It is the intention of the Government to issue a new series of banknotes, and it is expected that the new series will be issued in the near future. The new series will be issued in the form of banknotes, and it is expected that the new series will be issued in the near future. The new series will be issued in the form of banknotes, and it is expected that the new series will be issued in the near future.

There is a possibility that the new series will be issued in the near future.

44101

MAXIMILIAN J. ST. GEORGE  
and HENRY WM. LESCHER,  
Appellees,

v.

ONE LA SALLE COMPANY, a  
corporation,  
Appellant.

)  
) APPEAL FROM SUPERIOR  
) COURT OF COOK COUNTY.  
)

333 L.A. 646

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Plaintiffs' complaint prays for an injunction to restrain defendant from interfering with or preventing plaintiffs from moving into suite 2415 of the One North LaSalle Street building and installing therein the furniture, fixtures and files of Maximilian J. St. George, plaintiff, and to compel defendant to place and maintain the name of St. George on the building directory. In an amendment to the complaint St. George, plaintiff, claimed damages. Defendant appeals from a decree that contained the following orders and provisions:

"It is hereby ordered, adjudged and decreed that the defendant One North LaSalle Company, a corporation, its agents, servants, solicitors and attorneys be, and they are hereby restrained from interfering with or preventing the plaintiffs and their agents and servants from moving into and installing the furniture, pictures [fixtures] and files of the plaintiff Maximilian J. St. George into suite 2415 of One North LaSalle Street building, 1 North LaSalle Street, Chicago, Illinois.

"It is further ordered, adjudged and decreed that the defendant 1 No. LaSalle Company, a corporation, forthwith cause the name of Maximilian J. St. George to be restored to the building directory of the defendant located in the premises commonly known as One North LaSalle Street, Chicago, Illinois.

"It is further ordered, adjudged and decreed that the



MAXIMILIAN J. ST. GEORGE  
and HENRY M. KOSCH  
Appellants,

v.

ONE LA SALLE COMPANY, a  
corporation,  
Appellee.

COURT OF PEACE COUNTY,  
SOUTH DAKOTA

MR. JUSTICE STEPHEN DELIVERED THE VERDICT OF THE COURT.

The plaintiff's complaint prays for an injunction to

restrain defendant from interfering with or preventing

plaintiff from moving into what is called the "New North

LaSalle Street Building and Installation therein and from

renting, fixtures and other contents of the building and from

plaintiff, and to compel defendant to give and maintain

the name of St. George on the building directory. In an

agreement to the complaint St. George, plaintiff, alleged

damages. Defendant prays that the court may award

the following orders and provisions:

"It is hereby ordered, adjudged and decreed that the

defendant One North LaSalle Company, a corporation, its agents,

servants, solicitors and attorneys do, and they are hereby re-

strained from interfering with or preventing the plaintiff's

and their agents and servants from moving into and installing

the furniture, fixtures and other contents of the plaintiff's

Maximilian J. St. George into what is called the "New North LaSalle

Street Building, 1 North LaSalle Street, Chicago, Illinois.

"It is further ordered, adjudged and decreed that the

defendant One North LaSalle Company, a corporation, do

cause the name of Maximilian J. St. George to be restored to

the building directory of the defendant located in the premises

commonly known as One North LaSalle Street, Chicago, Illinois.

"It is further ordered, adjudged and decreed that the

defendant One N. LaSalle Company, a corporation, its agents, servants, solicitors and attorneys be, and they are hereby restrained from removing or causing to be removed the name of the said Maximilian J. St. George from the aforesaid building directory during the entire term that the said Maximilian J. St. George is a tenant or subtenant of said building.

"\* \* \*

"It is further ordered, adjudged and decreed that the court retain jurisdiction of this cause:

"(1) For the hearing of evidence in the matter of plaintiffs' damages and the entry of such decree as the evidence shall require;

"(2) For the consideration of any petition that may be filed herein by Joseph T. Harrington, amicus curiae, to cite parties or witnesses or others for contempt of court or to investigate in reference to any conspiracy or attempt to obstruct justice herein; and leave is hereby granted the said Joseph T. Harrington, amicus curiae, to file any such petition herein, with proper notice to any person named therein, within ten days after the entry of this decree.

"It is further ordered that the injunction granted herein shall be in full force and effect during the pendency of an appeal, if any."

In our view of this appeal it is only necessary for us to consider and determine one contention raised by defendant, viz: "Defendant's petition for change of venue was improperly denied." Plaintiffs filed their complaint at noon on March 3, 1947, and forthwith served notice on defendant "by handing a copy to W. Karkow, an employee of L. J. Sheridan and Company, managing agent" of the building in question, that on March 3, 1947, at 2 P.M. they would appear before Judge Crowe and move



that an injunction issue forthwith as prayed for in the complaint. At 2 o'clock P. M. of the same day plaintiffs appeared, pro se, before Judge Crowe, and John J. Faissler, a member of the firm of Sonnenschein, Berkson, Lautmann, Levinson & Morse, also appeared as counsel for defendant. Mr. Faissler stated to the court that he first heard of the case five minutes before 2 P. M. and that he had had no opportunity to familiarize himself with the case. Thereupon Judge Crowe entered an order that defendant file an answer to the complaint by March 4, at 10:30 A. M., and that the hearing on the complaint and answer be set for March 4, 1947, at 10:30 A.M. A few hours after the entry of the foregoing order the attorneys for defendant caused a written notice to be served upon plaintiffs that on March 4, 1947, at 10:30 A.M., or as soon thereafter as counsel could be heard, they would appear before Judge Crowe and present a petition for a change of venue from said judge on the ground that he was prejudiced against defendant. When the clerk called the case on the morning of March 4, 1947, Mr. St. George stated to the court that defendant was going to ask for a change of venue. The report of proceedings shows that the following then occurred: "The Court: Where is the petition? Mr. St. George: There is no petition. The Court: Swear the witness. (Witness sworn.) The Court: What is the motion? Mr. St. George: Motion for an injunction, your Honor. Henry Lescher, called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows: Direct Examination By Mr. St. George: Q. What is your name. A. Henry Lescher. Q. Where do you live? A. 2009 North Tripp avenue. Q. What is your occupation? A. Attorney-at-law. Q. Are you duly qualified to practice here in Chicago, Cook County, Illinois? A. Yes, I am. Q. Since





what time? A. Since May, 1943. Q. When did you start practicing? A. In about January, 1944. Q. In the meantime, you have been in the Army? A. No. I took a post-graduate course. (Faissler [an attorney for defendant] arrived.) Q. Where is your office? A. One North LaSalle street. Q. When did you first take this space at One North LaSalle street? A. December, 1944. Q. Who did you see about office space? Mr. Faissler: May I interrupt, please? I got here at 10:30 and the hearing was started. I wish to present -- The Court: It was set for 10:30. I didn't come on the Bench until after my watch showed 10:30. Mr. Faissler: I would like to present a petition for change of venue. The Court: It is too late. The matter is on hearing. Mr. Faissler: May I present the petition? The Court: You may present it. It will be denied. It comes too late. Mr. Faissler: Your Honor, may the record show that when I came into the court room, I looked at the clock at the back on the wall and it said 10:30. The Court: Not 10:30 by my watch. Mr. Faissler: And that the witness was being examined. The Court: Six minutes after 10:30. \* \* \* Wait a moment. There is nothing pending now except the examination of this witness. Mr. Faissler: Now, your Honor, I have filed this petition for change of venue -- The Court: It is denied. It came after the hearing had started. Mr. Faissler: It may be filed and denied? The Court: Yes." The further examination of the witness Lescher was then resumed and the trial of the cause proceeded. On March 5, 1947, Judge Crowe entered the following order: "It Is Hereby Ordered, Adjudged and Decreed, that Joseph T. Harrington, attorney at law, 111 West Washington Street, Chicago, Illinois, is appointed Amicus curiae or friend of the court in the above entitled cause [the instant proceeding] because the

what time? A. Since May, 1943. Q. When did you start practicing? A. In about January, 1944. Q. In the meantime, you have been in the Army? A. No. I took a post-graduate course. (Witness for defendant) arrived. Q. Where is your office? A. Two North LaSalle street. Q. When did you first take this case? A. On March 1, 1944. Q. In December, 1944. A. No. Did you see about office space? Mr. Peissler: Yes, I did. Please, I got here at 10:30 and the hearing was started. I was to present The Court: It was set for 10:30. I didn't come on the bench until after my watch showed 10:30. Mr. Peissler: I would like to present a petition for change of venue. The Court: It is too late. The matter is on hearing. Mr. Peissler: May I present the petition? The Court: You may present it. It will be denied. It comes too late. Mr. Peissler: Your Honor, the record show that when I came into the court room, I looked at the clock at the back of the hall and it said 10:30. The Court: Not 10:30 by my watch. Mr. Peissler: And that the witness was being examined. The Court: The witness after 10:30. \* \* \* At a moment. There is nothing pending now except the examination of this witness. Mr. Peissler: No, your Honor, I have filed this petition for change of venue -- The Court: It is denied. It came after the hearing had started. Mr. Peissler: It may be filed and denied? The Court: Yes. The further examination of the witness Peissler was then resumed and the trial of the cause proceeded. On March 2, 1947, Judge Crowe entered the following order: "It is hereby Ordered, Adjudged and Decreed, that Joseph T. Harrington, attorney at law, 111 West Washington Street, Chicago, Illinois, is appointed Amicus curiae or friend of the court in the above entitled cause [the instant proceeding] because the

court finds that there is a question of public importance involved."

The verified petition filed by defendant prayed for a change of venue from Judge Crowe on the ground that he was prejudiced against defendant. On March 6, 1947, Judge Crowe called to the witness stand Ed Cusack, a deputy clerk of the court serving in the courtroom of Judge Crowe, and interrogated him in respect to the time when the instant case was called for trial on March 4. The witness testified that the trial court convened court at 10 o'clock, heard motions of course, then recessed, and reconvened court at 10:30; that he knew it was 10:30 by the chimes in the Temple Building and that Judge Crowe resumed the bench right after the witness heard the chimes; that the witness had not "the slightest idea how many times it chimed"; that about 23 minutes to 11 (on March 4) two employees of the building came upstairs and set the clock; that the clock was slow about 13 minutes and the two men reset the time; that the witness called up the operator and asked her the correct time and she told him it was 23 minutes to 11. "The Court: \* \* \* Q. And was I alongside of you at the time? A. Yes, you were. Q. I had my watch out? A. Yes, sir. Q. Did you look at it? A. Yes, sir. Q. And did the time on my watch correspond with the information you received from her? A. Yes, sir, it did." The witness further testified that Lescher "began his testimony down in front of the bench, and then you [the court] suggested that he take the stand." During the testimony of this witness Mr. St. George, Mr. Faissler, and finally the court, agreed that Lescher was standing before the bar of the court testifying when Faissler came into the courtroom. On March 26, 1947, the trial court filed a written opinion that he had delivered at the completion of the

court finds that there is a question of public importance involved."

The verified petition filed by defendant prayed for a change of venue from Jackson Grove on the ground that he was prejudiced against defendant. On March 2, 1927, Judge Crowe called to the witness stand Ed Gurney, a deputy clerk of the court serving in the courtroom of Judge Crowe, and interrogated him in respect to the time when the instant case was called for trial on March 2. The witness testified that the trial court convened at 10 o'clock, 1927, and that he, Gurney, then recessed, and reconvened court at 10:30; that he knew it was 10:30 by the chimes in the Temple Building and that Judge Crowe resumed the bench right after the recess for the delay; that the witness did not "the slightest idea how many times it called"; that about 15 minutes to 11 (on March 2) two employees of the building came upstairs and sat the clock; that the clock was slow about 15 minutes and the two men reset the time; that the witness called up the overman and asked him the correct time and she told him it was 11 minutes to 11. "The correct time was 11:00, and was I forgetting of you at the time?" A. Yes, you were. Q. I had my watch only. A. Yes, sir. Q. Did you look at the watch, sir? A. Yes, sir, and the time on my watch correspond with the information you received from her? A. Yes, sir, it did. "The witness further testified that Bachelor began his testimony down in front of the bench, and then you [the court] suggested that he take the stand." During the testimony of this witness Mr. St. George, Mr. Falsais-ler, and finally the court, agreed that Bachelor was standing before the bar of the court testifying when Falsaisler came into the courtroom. On March 26, 1927, the trial court filed a written opinion that he had delivered at the completion of the



full hearing of the cause. He therein stated that he denied the petition for a change of venue "for the reason that it came too late, it then being 10:36 by the court's watch"; that "I reconvened court immediately after 10:30 as shown by the court's watch and the chimes of the Chicago Temple Building, the clock in the court room being approximately ten minutes slow." According to this statement, when Mr. Faissler presented the petition to the court the time by the courtroom clock was 10:26 A. M.

When the case was called by the clerk Mr. St. George, one of the plaintiffs and an experienced lawyer, notified the court that defendant was going to ask for a change of venue, and it is significant that Mr. St. George interposed no objection to defendant's petition for a change of venue when it was presented nor thereafter. Plaintiffs' case was a novel one, but when plaintiff Lescher was called as a witness the court had not read the complaint nor had Mr. St. George made any statement to the court as to the salient features of the case. It also appears that in the hurry to start the proceedings before the petition was presented the examination of Lescher was commenced without taking the time to have the witness seated in the witness chair. We are forced to the conclusion that the court hurried the commencement of the trial after he had been informed that defendant would present a petition for a change of venue; nevertheless, when Mr. Faissler attempted to present the petition the examination of Mr. Lescher had not progressed beyond a few preliminary questions and the answers thereto. That the trial court, in a peremptory way, should deny a petition for a change of venue that challenged his fairness, in the face of the fact that the courtroom clock showed that the petition was presented before 10:30 A.M., upon



Full hearing of the cause. The clerk stated that he denied the petition for a change of venue "for the reason that it came too late, it then being 12:30 by the court's watch; that if the court had been immediately called upon at about 11:30 the court's watch and the clock of the Chicago Times Building, the clock in the court room being approximately ten minutes slow." According to this statement, when Mr. Kessler presented the petition to the court two times by the courtroom clock was 12:30 P. M.

When the case was called by the clerk Mr. St. George, one of the plaintiffs and an experienced lawyer, notified the court that defendant was going to ask for a change of venue, and it is significant that Mr. St. George interposed no objection to defendant's petition for a change of venue when it was presented nor thereafter. Plaintiff's case was a novel one, but when Plaintiff's case was called as a witness the court did not read the complaint nor did Mr. St. George make any statement to the court as to the salient features of the case. It also appears that in the hurry to start the proceeding before the petition was presented the examination of

Plascher was commenced without taking the time to have the witness seated in the witness chair. We are forced to the conclusion that the court hurried the commencement of the trial after he had been informed that defendant would present a petition for a change of venue; nevertheless, when Mr. Kessler attempted to present the petition the examination of Mr. Plascher had not progressed beyond a few preliminary questions and the answers thereto. That the trial court, in a peremptory way, should deny a petition for a change of venue that challenged his fairness, in the face of the fact that the courtroom clock showed that the petition was presented before 12:30 P. M., upon

the ground that his watch showed that the petition was presented at 10:36 A.M., does not appeal to our sense of justice. It is true that an application for a change of venue made after the hearing of a cause has started comes too late, but that rule of law is not applicable to the particular facts of the instant case. It is the settled law of this State that a motion for a change of venue must be made at the earliest practical moment, and we hold that defendant complied with that law.

Although the petition averred that defendant fears that it will not receive a fair trial from Judge Crowe because the latter is prejudiced against defendant, under our practice, Judge Crowe had the right to pass judgment upon the petition, but in exercising that right it was his duty to act without feeling or bias and to accord to defendant its full rights under the letter and spirit of the Venue Act. In People v. Scott, 326 Ill. 327, the court states that the provisions of the Venue statute should receive a broad and liberal, rather than a technical and strict, construction, and should be construed so as not to defeat the right attempted to be attained therein, especially where prejudice of the presiding judge is charged. We are forced to the conclusion that Judge Crowe committed prejudicial and reversible error in denying the petition for a change of venue.

The decretal order of the Superior court of Cook county entered March 26, 1947, is reversed and the cause is remanded for a new trial.

As Judge Crowe is no longer a judge of the Superior Court it is unnecessary to direct that the petition for a change of venue be granted.

DECRETAL ORDER REVERSED AND CAUSE  
REMANDED FOR A NEW TRIAL.

Friend, P. J., and Sullivan, J., concur.

the ground that the motion was premature. It is true that an application for a change of venue may be made after the hearing of a case has started some time later, but that rule of law is not applicable to the particular facts of the instant case. It is the settled law of this State that a motion for a change of venue may be made at the very least practical moment, and we hold that defendant's complaint with that law.

Although the motion is not a matter of course that it will not receive a trial from Judge Grove because the latter is prejudicial against defendant, under our constitution Judge Grove had the right to pass judgment upon the petition, but in exercising that right it was his duty to act without feeling or bias and to depend on the facts and the law. Under the letter and spirit of the Venue Act, in Georgia, Code 326 III, 327, the court states that the provisions of the Venue statute should receive a broad and liberal, rather than a technical and strict, construction, and should be construed so as not to defeat the right attempted to be obtained therein, especially where provisions of the preceding judge is charged. He was forced to the conclusion that Judge Grove committed prejudicial and reversible error in denying the petition for a change of venue.

The decretal order of the Superior Court of Cook County entered March 26, 1947, is reversed and the case is remanded for a new trial.

As Judge Grove is no longer a judge of the Superior Court it is unnecessary to direct that the petition for a change of venue be granted.

44122

CITY OF CHICAGO, Appellee,

v.

HOLMES DAYLIE, Appellant.

97 A  
APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

332 LA. 646

MR. JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

A police officer, Francis J. Quinn, signed a complaint charging defendant with disorderly conduct. Defendant waived a trial by jury and the cause was submitted to the court for trial without a jury. The trial court found defendant guilty and assessed a fine against him in the sum of one dollar. The judgment order recites: "Judgment and costs suspended. No commitment." Defendant appeals from the judgment order.

On November 29, 1946, defendant filed with the clerk of the Municipal court the following document:

"Agreed Statement of Testimony in Lieu  
of Transcript of Evidence.

"This cause coming on to be heard before the Honorable Michael Tremko, presiding Judge of the Felony Court at 26th Street and California Avenue, Chicago, Illinois on the 20th day of November, A. D. 1946, on the charges against said defendant, Holmes Daylie of violation of City Code No. 193-1 in Case No. 46M 131957, said charge being otherwise designated as disorderly conduct and the defendant, Holmes Daylie being represented by Jay J. McCarthy, Esquire, and the cause prosecuted by the Assistant States Attorney, acting in lieu of Assistant City Attorney for the City of Chicago, the following testimony was heard:

"Officer Fitzgerald testified that he was attached to the Woodlawn Avenue Police Station of the Police Department of the City of Chicago, Illinois and that he was called to the business operated and known as El Grotto Tavern located



APPEAL FROM JUDICIAL  
COURT OF CHICAGO

CITY OF CHICAGO,  
Appellee,  
v.  
HOWARD DAVIS,  
Appellant.

THE JUSTICE CLERK HAS REVIEWED THE DECISION OF THE COURT.

A police officer, Francis J. Quinn, signed a complaint charging defendant with disorderly conduct. Defendant raised a trial by jury and the cause was submitted to the court for trial without a jury. The trial court found defendant guilty and assessed a fine against him in the sum of one dollar. The judgment order recites: "Judgment and costs pronounced in defendant's favor. Defendant appeals from the judgment order."

On November 2, 1946, defendant filed with the clerk of the judicial court the following document:

"Agreed Statement of Testimony in Lieu of Transcript of Evidence."

"This cause coming on to be heard before the Honorable Michael T. Quinn, presiding judge of the judicial court at 200 N. Dearborn and California Avenues, Chicago, Illinois, on the day of November, A. D. 1946, on the charges against said defendant, charges of violation of City Code No. 19-1 in Case No. 458127, said charges being otherwise designated as disorderly conduct and the defendant, Howard Davis being represented by J. A. McArthur, Esquire, and the cause prosecuted by the Assistant State Attorney, acting in lieu of Assistant City Attorney for the City of Chicago, the following testimony was heard:

"Officer Fitzgerald testified that he was attached to the Woodlawn Avenue Police Station of the Police Department of the City of Chicago, Illinois and that he was called to the business operated and known as El Greco Tavern located



at 64th and Cottage Grove Avenue, Chicago, Illinois, on to-wit: August 16, 1946 and that he arrested the defendant Holmes Daylie, who was employed as a bartender in said place of business and interrogated the said Holmes Daylie in the presence of one Grant Smith, who was not present at the trial and hearing of this cause on to-wit: November 20, 1946, having failed to respond in this cause as complaining witness against said Holmes Daylie, and in the case in which said Holmes Daylie had taken out a warrant against said Grant Smith on a charge of assault to commit murder for having attacked said defendant, Holmes Daylie, in the police station with knife and severely and viciously slashing him [with] said concealed knife.

"Officer Fitzgerald further said that the defendant, Holmes Daylie, admitted 'having swung on said complaining witness, Grant Smith'. The prosecuting witness did not testify as he was not present in the court and the hearing in that respect was ex parte.

"The defendant, Holmes Daylie, testified that the complaining witness in this case and the defendant in the other case, on which bond was forfeited, had run up a bar bill of \$6 or \$7 and refused to pay and became noisy and quarrelsome and called the said defendant, Holmes Daylie, vile, vicious and unprintable names, cursing and swearing at said Holmes Daylie and hit said Holmes Daylie and tried to attack said Holmes Daylie, who defended himself and resisted the attack by hitting the said complaining witness.

"The presiding Judge of the Court, the Honorable Michael Tremko, made a finding of guilty and assessed a fine of One Dollar (\$1.00) and One Dollar (\$1.00) cost against said defendant and upon motion for new trial overruled an exception by defendant's counsel and on motion for arrest of judgment over-



ruled an exception by counsel for defendant. The Court stated 60 days for a Bill of Exceptions and surety bond in the sum of \$200.00 costs for an appeal upon motion by attorney for defendant to continue the cause until November 29, 1946. The Court granted said continuance, but that the record entered by the Clerk shows a fine of One Dollar (\$1.00) and One Dollar (\$1.00) cost, suspended, but fails to show the entry of the order continuing cause or for the appeal and time in which to file Bill of Exceptions and counsel for defendant files this statement of testimony at the hearing in the said cause on the aforesaid date in lieu of a transcript of proceedings.

"CITY OF CHICAGO        )  
STATE OF ILLINOIS     ) SS  
COUNTY OF COOK        )

"I, Michael Tremko, Judge of the Municipal Court of the City of Chicago, and presiding Judge at the hearing of the above entitled cause, do hereby certify that the foregoing is a true and correct report of proceedings at said hearing in the nature of a statement of fact, in lieu of a transcript of evidence.

"And forasmuch, therefore, as the matters and things hereinbefore set forth do not otherwise fully appear of record, the defendant Holmes Daylie, by his counsel, Jay J. McCarthy, enters this, his report of proceedings, and prays that the same may be settled, signed and sealed by the Judge of this Court, pursuant to the statute in such case made and provided.

"Which is accordingly done the 29th day of November, A. D. 1946.

[Signed] "Michael Tremko  
"Judge of the Municipal Court,  
City of Chicago"

After defendant filed the record in this court plaintiff filed a written motion and suggestions in support of it to dismiss the appeal or in the alternative to strike the purported

in lieu of a transcript of proceedings.

testimony at the hearing in the said cause on the above date  
 Exceptions and counsel for defendant files brief statement of  
 ring cause or for the appeal and time in which to file bill of  
 cost, expended, but fails to show the entry of the order awarding  
 Clerk shows a fine of One Dollar (\$1.00) and the Delinquent (\$1.00)  
 tented said certificate, but that the record ordered by the  
 not to continue the cause until November 1, 1940. The Court  
 \$200.00 costs for an appeal upon motion by attorney for defendant  
 60 days for a bill of Exceptions and money paid in the sum of  
 ruled an exception by counsel for defendant. The Court stated

CITY OF CHICAGO  
 STATE OF ILLINOIS  
 COUNTY OF COOK

"I, Michael Trench, Judge of the Criminal Court of the  
 City of Chicago, and presiding judge of the hearing of the above  
 entitled cause, do hereby certify that the foregoing is a true  
 and correct report of proceedings at said hearing in the cause  
 of a statement of fact, in lieu of a transcript of evidence.  
 and Trench, therefore, at the Court and taking oath  
 in before set forth do not otherwise fully appear of record, the  
 defendant Holmes Bailey, by his counsel, Jay L. McCarthy, entered  
 this, his report of proceedings, and prays that the same may be  
 settled, signed and sealed by the Judge of said Court, pursuant  
 to the statute in such case made and provided.

which is necessarily done the 25th day of November, 1940.

[Signed] Michael Trench  
 "Judge of the Criminal Court  
 City of Chicago"

After defendant filed the record in this court plaintiff  
 filed a written motion and suggestions in support of it to dis-  
 miss the appeal on the alternative to strike the purported



"Agreed Statement of Testimony in Lieu of Transcript of Evidence" from the record. In support of the motion plaintiff contended that the document in question fails to disclose that the statement of facts was agreed upon by written stipulation between the parties as provided for in Subsection (1) (d) of Rule 36 of the Rules<sup>of</sup> Practice of the Supreme Court of Illinois. We inadvertently denied plaintiff's motion. Plaintiff has renewed the motion and insists that the record fails to disclose that the purported "Agreed Statement of Testimony in Lieu of Transcript of Evidence" was ever submitted to the attorney for plaintiff for approval, or that plaintiff ever agreed by written stipulation to the purported statement of testimony. Counsel for plaintiff state that they never agreed to the statement by written stipulation or otherwise; that the document was never even submitted to them, and that the said statement is such a "flagrant misstatement of fact" as to what occurred before the trial court that they are compelled to stand by the motion to strike. After a further consideration of plaintiff's motion we are satisfied that it is a meritorious one. Rule 36 of the Supreme Court first provides for a report of proceedings, but it is admitted that defendant did not file such a report. Subsection (1) (d) of said rule provides:

"(d) In lieu of such report of the proceedings, the parties may by written stipulation agree upon a statement of the facts material to the controversy, and shall present such statement to any judge qualified to certify to the correctness of a report of the proceedings in said case, for his certificate of correctness, and shall file the same in the trial court within 50 days after the appeal has been perfected, subject to the same provisions as to extension hereinbefore set forth regarding the filing of a report of the proceedings."



"Agreed Statement of Facts" in lieu of testimony of parties from the record. In support of the motion plaintiff contends that the document in question fails to disclose that the statement of facts was agreed upon by written stipulation between the parties as provided for in subsection (1) (a) of Rule 36 of the Rules of the Supreme Court of Illinois. We inadvertently & mislabeled the motion. Plaintiff has renewed the motion and insists that the court fails to disclose that the purported "Agreed Statement of Facts" in lieu of Transcript of Evidence was ever submitted to the attorney for plaintiff for approval, or that plaintiff ever agreed by written stipulation to the purported statement of testimony. Counsel for plaintiff states that they never agreed to the statement by written stipulation or otherwise; that the document was never even submitted to them, and that the same is true as to such a "Plaintiff's Statement of Facts" as to what occurred before the trial court that they are unwilling to agree by the motion to stipulate. After a further examination of plaintiff's motion we are satisfied that it is a violation of Rule 36 of the Supreme Court that provides for a report of proceedings, but it is admitted that defendant has not filed such a report. Subsection (1) (d) of said rule provides:

"(d) In lieu of such report of the proceedings, the parties may by written stipulation agree upon a statement of the facts material to the controversy, and shall present such statement to any judge qualified to certify in his certificate of a report of the proceedings in said case, for his certification of correctness, and shall file the same in the trial court within 30 days after the appeal has been perfected, subject to the same provisions as to extension hereinafter set forth regarding the filing of a report of the proceedings."

The record fails to show that the purported "Agreed Statement of Testimony in Lieu of Transcript of Evidence" was ever submitted to the attorney for plaintiff for approval or that said attorney ever agreed to the said statement by written stipulation. That defendant failed to comply with the rule of the Supreme Court is clear. In Gyure v. Sloan Valve Co., 367 Ill. 489, the court stated (p. 493):

"This court has not only the inherent power to prescribe rules of practice and procedure, but the power is expressly conferred by the statute. (Ill. Rev. Stat. 1937, chap. 110, par. 126.) Such rules, when established, have the force of law. (People v. Gallop, 358 Ill. 11; Lancaster v. Waukegan and Southwestern Railway Co., 132 id. 492.) The bar is presumed to be aware of the rules prescribed. (Buckley v. Eaton, 60 Ill. 252.)"

Subsection (1) (e) of Rule 36 provides for a dismissal of appeal where the appellant fails to file a report of proceedings or an agreed statement of facts within the time originally allowed or extended. Upon the record before us, it is our plain duty to sustain plaintiff's motion to strike the purported "Agreed Statement of Testimony in Lieu of Transcript of Evidence" from the record and as the four points urged by defendant in support of his contention that the judgment should be reversed are all based upon evidence alleged to have been heard by the trial court, the judgment of the Municipal Court of Chicago must be affirmed, and it is accordingly so ordered.

JUDGMENT AFFIRMED.

Friend, P. J., and Sullivan, J., concur.

The record fails to show that the proposed "agreed

statement of testimony in lieu of transcription of witness  
was ever submitted to the attorney for plaintiff for approval  
or that said attorney ever agreed to the said statement by  
written stipulation. That defendant failed to comply with  
the rule of the Supreme Court is clear. In Wright v. Wright,  
15 Cal. 2d 107, 108, the court stated (p. 107):

"This court has not only the inherent power to pre-

scribe rules of practice and procedure, but the power to  
expressly command by law. Wright v. Wright, 15 Cal. 2d 107, 108, 109,  
supra, 110, per, Justice, then rules, when established, have  
the force of law. (People v. Wilson, 32 Cal. 2d 111, 112; People v.  
W. Wilson and Josephine Wilson, 15 Cal. 2d 107, 108, 109, 110, 111,  
but is presumed to be aware of the rules prescribed. People v.  
W. Wilson, 32 Cal. 2d 111, 112.")

Subsection (1) (a) of Rule 15 provides for a stipulation  
of appeal where the appellant fails to file a report of pro-  
ceedings or an agreed statement of facts within the time  
originally allowed or extended. Upon the record before us,  
it is our plain duty to sustain plaintiff's motion to require  
the proposed "agreed statement of testimony in lieu of  
transcript of witness" from the record and in the four points  
urged by defendant in support of his contention that the agree-  
ment should be reversed the all named then witnesses alleged  
to have been heard by the trial court, the judgment of the  
Superior Court of Chicago must be affirmed, and it is hereby  
so ordered.

JUDGMENT AFFIRMED.

43892

FROLICS, INC.,  
Appellee,

v.

REPUBLIC WAREHOUSE CORPORA-  
TION, a corporation.

HARRY EAGER, Intervening  
Petitioner below,  
Appellant.

APPEAL FROM SUPERIOR COURT,  
COOK COUNTY.

333 I.A. 647

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

An action of replevin was instituted by the plaintiff, Frolics, Inc., against the defendant, Republic Warehouse Corporation, in whose warehouse the liquor replevied had been stored by Harry Eager. Eager filed an intervening petition claiming ownership of the liquor. A trial of right of property was had by the court without a jury, which resulted in the entry of a judgment order finding that the plaintiff, Frolics, Inc. was the lawful owner of the property. Eager, the intervening petitioner, appeals. There is no question raised on the pleadings.

For a proper understanding of the questions presented for our determination it is necessary to set forth rather fully the salient facts shown by the evidence.

In November, 1945 and for some months prior thereto Eager, the intervening petitioner, who had theretofore been in the night club business, was engaged in remodeling and furnishing the premises at 3 North Clark street in the City of Chicago for the operation of a night club. Sometime in November, before the project was completed, Arthur Krooth and Norman Schlossberg, who were both in the liquor business, decided to join Eager in the night club venture by each purchasing from him a one-third interest therein. On November

WILLIAM, JR.,  
JAMES, JR.

v.

REPUBLICAN NATIONAL PARTY  
INC., a corporation.

ALICE SMITH, Intervener  
Testimony below,  
Exhibit.

1. JAMES SMITH, following the death of his son,

in action of repudiation and in violation of the plaintiff's  
rights, and, against the defendant, repudiation and in violation of

plaintiff, in these respects: the first repudiation and in violation  
of the plaintiff's rights, and, against the defendant, repudiation and in violation of

plaintiff's ownership of the property, and, against the defendant, repudiation and in violation of

plaintiff's ownership of the property, and, against the defendant, repudiation and in violation of

plaintiff's ownership of the property, and, against the defendant, repudiation and in violation of

plaintiff's ownership of the property, and, against the defendant, repudiation and in violation of

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plaintiff's ownership of the property, and, against the defendant, repudiation and in violation of

plaintiff's ownership of the property, and, against the defendant, repudiation and in violation of



26, 1945 Eager, Krooth and Schlossberg signed a written contract, which was prepared by their attorneys. Under the terms of this contract a corporation to be known as Frolics, Inc., was to be organized to complete the construction of the night club and to operate it. The contract also provided that Eager, Krooth and Schlossberg were each to receive one-third of the stock of the corporation, to be issued to them or to their nominees; that Krooth and Schlossberg were each to pay \$11,000 for his one-third interest in the project; <sup>and</sup> that ~~that~~ 10,000 of this \$22,000 was to be paid to Eager personally and the balance of \$12,000 was to be paid to his creditors, who had theretofore furnished materials and labor for the construction of the night club. All of the foregoing terms of the contract were complied with by the parties. Shortly after said contract was executed, Frolics, Inc., was organized and certificates for one-third of its stock were issued to nominees of each of said parties.

At the time the preorganization contract was executed and for two years prior thereto, Eager was the owner of 1449 cases of choice whiskey and brandy and other assorted liquors, which were stored by him in the warehouse of the defendant, Republic Warehouse Corporation.

Although Krooth and Schlossberg held their stock in the names of nominees and subsequently caused some of it to be transferred to others, it is uncontroverted that they had authority to act on behalf of the corporate plaintiff in their dealings with Eager, hereinafter referred to, concerning the purchase of his liquor.

While there was a conflict in the evidence as to whether or not Eager stated to Krooth and Schlossberg that his stock of liquor in the warehouse would be available for purchase by Frolics, Inc. for use in its night club, we think that the



evidence shows beyond question that Eager did make that statement to them, when the preorganization contract was executed on November 26, 1945, and on several occasions thereafter. Some of the plaintiff's witnesses testified that Eager stated that his liquor went with the "deal" but that testimony could not have been true, because Eager's liquor was not mentioned in the aforesaid contract.

Late in November or early in December, 1945, Krooth initiated negotiations with Eager for the purchase of his liquor by the corporate plaintiff. These negotiations continued until, according to Krooth, Eager agreed orally to sell all of the liquor he had stored in the warehouse to Frolics, Inc. for \$55,000, the O.P.A. wholesale ceiling price, the liquor to be delivered as needed and paid for when delivered. Schlossberg corroborated the testimony of Krooth in this regard. Eager admitted that preliminary negotiations were had concerning an agreement to purchase his liquor but he denied that such an agreement was ever consummated. Plaintiff's complaint did not aver the date of the alleged oral agreement, concerning which Krooth testified, and neither Krooth nor Schlossberg testified definitely as to the date on which this purported oral agreement was made. It appears, however, that Eager wrote a letter concerning the liquor on December 17, 1945 to E. C. Yellowley, who was then in charge of the Chicago division of the Alcohol Tax Unit of the Federal Government. Krooth and Schlossberg testified variously that the oral agreement to purchase the liquor was consummated either on the same day that Eager wrote the letter to Yellowley or on some indefinite date before said letter was written. Krooth, Schlossberg and Morris Weiss, who was also called as a witness by plaintiff, all testified that they saw Eager write the letter to Yellowley and that he stated

evidence shows beyond question that Lager did not state  
ment to them, when the prearrangement contract was executed  
on November 22, 1942, and on several occasions thereafter,  
one of the plaintiff's witnesses testified that Lager stated  
that his liquor went with the "deal" but that defendant could  
not have been told, because Lager's liquor was not mentioned  
in the aforesaid contract.

Late in November or early in December, 1942, Krooth  
initiated negotiations with Lager for the purchase of his  
liquor by the corporate plaintiff. These negotiations con-  
tinued until, according to Krooth, Lager agreed orally to sell  
all of the liquor he had stored in the warehouse to plaintiff,  
Inc., for \$75,000, the \$25,000 wholesale selling price, the  
liquor to be delivered as needed and paid for when delivered.  
Krooth testified that defendant corroborated the testimony of Lager in this regard.  
Lager admitted that preliminary negotiations were had concerning  
an agreement to purchase his liquor but he denied that such an  
agreement was ever consummated. Plaintiff's complaint did not  
cover the date of the alleged oral agreement, contending that  
Krooth testified, and neither Krooth nor defendant testified  
definitely as to the date on which this purported oral agree-  
ment was made. It appears, however, that Lager wrote a letter  
concerning the liquor on December 17, 1942 to E. C. Wolfson,  
who was then in charge of the alcohol division of the Federal  
Tax Unit of the Federal Government. Krooth and defendant  
testified variously that the oral agreement to purchase the  
liquor was consummated either on the same day that Lager wrote  
the letter to Wolfson or on some indefinite date before said  
letter was written. Krooth, defendant and Morris Weiss, who  
was also called as a witness by plaintiff, all testified that  
they saw Lager write the letter to Wolfson and that he stated

therein that it was his intention to sell all of his liquor to Frolics, Inc. (sometimes hereinafter for convenience referred to as Frolics). Eager testified that he wrote the letter to Yellowley "to let them know that he contemplated selling to Frolics the 1449 cases of liquor in the warehouse." Eager's testimony in this regard was corroborated by Yellowley's reply to his letter, which was as follows:

"December 17, 1945.

Mr. Harry Eager,  
3 North Clark Street  
Chicago 2, Illinois

Dear Mr. Eager:

Receipt is acknowledged of your letter of December 17, 1945, relative to your proposal to sell a quantity of liquors now owned by you to Frolics, Incorporated.

In reply you are advised that inasmuch as the procedure to be followed in legally effecting the proposed sale depends upon a number of factors not discussed in your letter a representative of this office will call on you within a few days for the purpose of securing additional information.

Very truly yours,  
E. C. Yellowley,  
District Supervisor."

Morris Weiss further testified as a witness for plaintiff that he had been associated with Frolics until about the end of January, 1946; and that the only thing that kept "us" from completing the agreement was that Eager did not know "whether he wanted to make the bill of sale out for 1946 or 1945." The following then occurred during the course of the redirect examination of Weiss by plaintiff's attorney: "Q. Mr. Weiss, you testified that a person who was a friend of yours -- what kind of a contract was this lawyer supposed to write that Eager recommended to? \* \* \* THE WITNESS: There was a bill of sale -- MR. MAY: He doesn't know anything about the contract. THE WITNESS: I know it was supposed to get up a bill of sale but I didn't know anything about a contract. Q. A bill of sale



therein that it was his intention to sell all of his liquor  
to Prolic, Inc. (sometimes known as Prolic, Inc. for insurance re-  
ferred to as Prolic). After stating that he wrote the  
letter to Yellowley "to let him know that he contemplated  
selling to Prolic the 1449 cases of liquor in his warehouse,"  
Pager's testimony in this regard was corroborated by Yellowley's  
reply to his letter, which was as follows:

"November 1, 1944."

Mr. Harry Pager,  
3 North Clark Street  
Chicago 2, Illinois

Dear Mr. Pager:

I accept as yours a bill of sale of November 1,  
1944, relative to your proposal to sell a quantity of liquors  
now owned by you to Prolic, Incorporated.

In reply you are advised that I intend to the proceeds  
to be followed in legally effecting the proposed sale depends  
upon a number of factors which I will call a type-  
tentative of this office will call on you within a few days for  
the purpose of securing additional information.

Very truly yours,  
F. C. Yellowley,  
Legal Representative."

Robert Weiss, a witness in this case, testified for Plaintiff  
that he had been associated with Robert Weiss about the end of  
January, 1944; and that the only thing that kept him from com-  
pleting the agreement was that Pager did not say "whether he  
wanted to sell the bill of sale on 11/1/44 or 11/4/44." The  
following then occurred during the course of the indirect exami-  
nation of Weiss by Plaintiff's attorney: "Q. Now, also, you  
testified that a person who was a friend of yours -- that name  
of a contract was this lawyer supposed to write that Pager re-  
commended to? \* \* \* THE WITNESS: There was a bill of sale --  
MR. WEISS: He doesn't know anything about the contract. THE  
WITNESS: I know it was supposed to get up a bill of sale but  
I didn't know anything about a contract. Q. A bill of sale

for what? A. The merchandise in the warehouse. Q. He did, that which had been delivered? A. That is right. As far as the merchandise was delivered, we had a contract on that. Q. In other words for everything which Eager owned before anything was delivered to the Frolics? A. That is correct, he was supposed to write up a bill of sale for it. \* \* \* MR. MAY: That is all. Judge, I am taken by surprise by Mr. Weiss' examination."

It is undisputed that on December 23, 1945 Krooth collaborated with Eager in the preparation of a penciled memorandum to be presented to a lawyer on the following day so that a formal contract might be drawn up by him for the sale of the liquor to Frolics. On December 24, 1945 Eager and Krooth went to the office of Attorney Anthony J. Sakelson and discussed with him the terms they wanted incorporated in a written contract for the sale of all the liquor owned by Eager to the plaintiff. The terms discussed included those noted in the memorandum made the previous day. This memorandum was turned over to the lawyer. Attorney Sakelson told Eager and Krooth that he would notify them when he had the contract prepared.

The construction of the night club was completed and it was ready to open for business on December 27, 1945, which was three days after Eager and Krooth had gone to the office of Attorney Sakelson and requested him to prepare a written contract for the sale of the liquor to Frolics. During the morning of December 27, 1945 Eager delivered to Frolics 207 cases of the liquor that he had in the warehouse. Eager testified in effect that pending the preparation and execution of the written contract, whereby he was to sell all of his liquor to the plaintiff, he arranged with Krooth to furnish 207 cases of his liquor

For what? The merchandise in the warehouse. The fact which has been delivered. A. That is right. Is for the merchandise was delivered, we had a contract on that. In other words for everything which Lager owned before anything was delivered to him Krooth? A. That is correct, he was supposed to write up a bill of sale for it. That is all. Judge, I am taken by surprise by Mr. Elias' examination."

It is undisputed that on December 27, 1945 Krooth collaborated with Lager in the preparation of a memorandum to be presented to a lawyer on the following day so that a formal contract might be drawn up by him for the sale of the liquor to Krooth. On December 28, 1945 Lager and Krooth went to the office of Attorney Bakelison and discussed with him the terms they wanted incorporated in a written contract for the sale of all the liquor owned by Lager to the plaintiff. The terms discussed included those noted in the memorandum made the previous day. This memorandum was turned over to the lawyer. Attorney Bakelison told Lager and Krooth that he would notify them when he had the contract prepared.

The construction of the night club was completed and it was ready to open for business on December 27, 1945, which was three days after Lager and Krooth had gone to the office of Attorney Bakelison and requested him to prepare a written contract for the sale of the liquor to Krooth. During the morning of December 27, 1945 Lager delivered to Krooth 207 cases of the liquor that he had in the warehouse. Lager testified in effect that pending the preparation and completion of the written contract, whereby he was to sell all of his liquor to the plaintiff, he arranged with Krooth to furnish 207 cases of his liquor

to Frolics so that it might have a sufficient supply on hand for the opening of its night club and that he was to be paid \$7696.13, the O.P.A. wholesale ceiling price for this liquor, upon its delivery. Krooth testified that on the morning of December 27, 1945 Frolics received 207 cases of Eager's 1449 cases of liquor and that same were delivered pursuant to the oral contract claimed to have been made on December 17, 1945 or at some time prior thereto.

After Eager delivered the 207 cases of liquor to Frolics on December 27, 1945, he repeatedly demanded payment therefor. According to Krooth and Schlossberg, the reason Eager was not paid for the 207 cases of liquor upon their delivery was that the corporate plaintiff was required to use practically all of its available cash to pay a chattel mortgage note for \$7500 which Eager had given to persons who were originally associated with him in the night club venture. This note had been reduced to \$7100 and the plaintiff paid said balance due thereon four days after the 207 cases of liquor had been delivered. Under the terms of the preorganization contract, said note was to be assumed by Frolics and Eager, Krooth and Schlossberg were each to contribute \$2500 for its payment. These contributions were made and were used by Frolics to pay the note. Krooth also testified that Frolics did not pay for the 207 cases of liquor when they were delivered, because it wanted to pay for all of the liquor at one time.

After the draft of the written contract had been completed (hereinafter for convenience referred to as the Sakelson contract), Krooth and Eager were notified and met in Attorney Sakelson's office on January 3, 1946, which was seven days after Eager had delivered the 207 cases of liquor to Frolics. The attorney read and explained the terms of the proposed con-

to Trolics so that it might have a sufficient supply on hand for the opening of its night club and that he was to be paid \$1000.00, the U.S.A. Wholesale selling price for this liquor, upon its delivery. Trost testified that on the morning of December 29, 1944 Trolics received 207 cases of Rector's 147 cases of liquor and that same were delivered pursuant to the oral contract claimed to have been made on November 1, 1944 or at some time prior thereto.

After Lager delivered the 207 cases of liquor to Trolics on December 29, 1944, he reportedly demanded payment therefor. According to Trost and Schlossberg, this demand was not paid for the 207 cases of liquor upon their delivery was that the corporate plaintiff was required to pay the plaintiff its available cash to pay a partial corporate note for \$1000 which Lager had given to persons who were allegedly associates with him in the night club venture. This note had been turned to Trost and the plaintiff said that within the person form days after the 207 cases of liquor had been delivered. Under the terms of the organization contract, said note was to be assumed by Trolics and Lager, Trost and Schlossberg were to contribute \$2500 for its payment. These contributions were made and were used by Trolics to pay the note. Trost also testified that Trolics did not pay for the 207 cases of liquor when they were delivered, because it wanted to pay for all of the liquor at one time.

After the draft of the written contract had been submitted (hereinafter for convenience referred to as the "written contract"), Trost and Lager were notified and met in Lager's Sakelion's office on January 3, 1945, which was seven days after Lager had delivered the 207 cases of liquor to Trolics. The attorney read and explained the terms of the proposed con-



tract to Eager and Krooth. According to Attorney Sakelson, Eager was satisfied with the contract as drawn and, while Krooth first objected to some of its terms, he "finally took the original and a copy of this agreement, and he left, saying that he thought it would be all right." Krooth testified that he could not say whether he then thought that the contract was satisfactory to him or not.

Krooth testified that he discussed the terms of the Sakelson contract with Schlossberg and they decided that it should not be executed by Frolics principally because of the provisions therein as to the method of payment and the proportion in which the "desirable and undesirable" liquor might be withdrawn from the warehouse.

The very first sentence of the Sakelson contract recited that Eager was the owner of the liquor. As to the method of payment, it provided in substance that Frolics would purchase all of Eager's liquor for \$55,000; that the corporate plaintiff would execute and deliver to Eager eleven "promissory, judgment, demand notes" for \$5000 each with interest at the rate of 5%, said notes to be payable "in eleven equal monthly installments"; that the liquor was to be partially released from the warehouse by Eager in direct proportion "to the amount of payment" by Frolics. As to the method of withdrawal of the liquor from the warehouse, the contract provided that Frolics could take out the liquor as paid for "at the rate of at least two cases of wines, rums, etc. to every one case of scotch, (bonded or straight) whiskey or French Brandy until said inventory is exhausted."

On January 9, 1946 Eager sold his stock in the plaintiff corporation to Krooth for \$2000. This was six days after Krooth had taken the draft of the written contract from Attorney Sakel-

tract to Lager and Frost. According to Attorney Lasker, Lager was satisfied with the contract as drawn and, while Frost first objected to some of its terms, he "finally took the original and a copy of this agreement, and he left, saying that he thought it would be all right." Frost testified that he could not say whether he then thought that the contract was satisfactory to him or not.

Frost testified that he discussed the terms of the Lasker contract with Lasker and they decided that it should not be executed by Frost personally because of the provisions therein as to the method of payment and the provision in which the "desirable and undesirable" liquor might be withdrawn from the warehouse.

The very first sentence of the Lasker contract reads that Lager was the owner of the liquor, as to the method of payment, it provided in substance that Frost would purchase all of Lager's liquor for \$25,000; that the corporate plaintiff would execute and deliver to Lager eleven "promissory, interest-bearing notes" for \$5000 each with interest at the rate of 6%, said notes to be payable "in eleven equal monthly installments" that the liquor was to be partially released from the warehouse by Lager in direct proportion to the amount of payment by Frost, as to the method of withdrawal of the liquor from the warehouse, the contract provided that Frost could take out the liquor as paid for "at the rate of at least two cases of wines, rum, etc. to every one case of brandy" (bottled or straight) whiskey or French Brandy until said inventory is exhausted."

On January 2, 1926 Lager sold his stock in the plaintiff corporation to Frost for \$2500. This was six days after Frost had taken the first of the written contract from Attorney Lasker.

son's office, presumably to be signed by the officers of Frolics, Inc. After said date Eager was a stranger to the night club project. Krooth testified that when Eager sold his stock to him, he (Eager) asked him if he still wanted to purchase the liquor and he (Krooth) answered "positively." At that time the Sakelson contract was still in Krooth's possession unsigned.

Eager testified that subsequent to January 9, 1946 he continued to importune Krooth and Schlossberg to pay him for the 207 cases of liquor delivered on December 27, 1945. Witnesses for Frolics testified that he did not ask for the payment of \$7696.13 after January 9, 1946 but demanded \$55,000 for his entire stock of liquor, including the 207 cases already delivered.

Schlossberg and his brother-in-law, Harry Mandell, who was then president of the plaintiff corporation, testified in effect that on January 17, 1946 Eager came to a table in the night club at which they were eating; that Eager inquired of Schlossberg when he was going to get his \$55,000; that Schlossberg advised him at that time that he was responsible himself for the delay in getting his money because he had not directed the warehouse company to furnish the South East National Bank with a copy of the inventory of the liquor which he had stored in the warehouse; and that he (Eager) promised to authorize the warehouse company to furnish such inventory to the bank immediately. William B. Gardner, president of the warehouse company, testified that about the middle of January 1946 he was directed by Eager in a telephone conversation to prepare an inventory of his liquor and to deliver a copy thereof to the bank. Eager denied having either the foregoing conversation testified to by Schlossberg and Mandell or that testified

son's office, presumably to be signed by the officers of  
Prolics, Inc. After said date Lager was a stranger to the  
night club project. Krooth testified that when Lager sold his  
stock to him, he (Lager) asked him if he still wanted to pur-  
chase the liquor and he (Krooth) answered "positively." At  
that time the Bakelion contract was still in Krooth's possession  
unassigned.

Lager testified that subsequent to January 7, 1945 he  
continued to importune Krooth and Schlossberg to pay him for  
the 200 cases of liquor delivered on December 27, 1944. At-  
tention for Prolics testified that he did not ask for the pay-  
ment of \$2,000.15 after January 7, 1945 but demanded \$2,000  
for his entire stock of liquor, including the 200 cases already  
delivered.

Schlossberg and his brother-in-law, Harry Mandell, who  
was then president of the Bakelion Corporation, testified in  
effect that on January 17, 1945 Lager came to a table in the  
night club at which they were sitting; that Lager informed of  
Schlossberg when he was going to get his 200 cases that Schloss-  
berg advised him at that time that he was going to take the  
for the delay in getting his money because he had not liquidated  
the warehouse company to transfer the stock that National Bank  
with a copy of the inventory of the liquor which he had stored  
in the warehouse; and that he (Lager) promised to mortgage  
the warehouse company to transfer such inventory to the bank  
immediately. William E. Gardner, president of the warehouse  
company, testified that about the middle of January 1945 he  
was directed by Lager in a telephone conversation to prepare  
an inventory of his liquor and to deliver a copy thereof to  
the bank. Lager denied having either the foregoing conversa-  
tion testified to by Schlossberg and Mandell or that testified



to by Gardner.

In any event the bank did receive an inventory of Eager's liquor sometime prior to January 27, 1946 and arranged to loan Frolics \$55,000 on condition that said amount should not be paid to Eager until he surrendered his warehouse receipts and the warehouse company issued new warehouse receipts to Frolics, which were to be delivered to the bank as security for its loan.

On January 27, 1946 Eager appeared at the night club and had a conversation with Schlossberg. While there was a conflict in the testimony of the witnesses as to whether Eager sought at that time to collect for the liquor already delivered or for all of his liquor, it is undisputed that Schlossberg asked Eager to meet him at the place of business of the Republic Warehouse Corporation on the following morning at 11:30 with his warehouse receipts, according to Eager, to "sit down and make a deal" and according to Schlossberg, so that they could close the deal with the \$55,000, which he expected the bank to loan Frolics that morning.

Eager appeared the following morning at the appointed hour at the place of business of the Republic Warehouse Corporation but Schlossberg did not show up. Schlossberg testified that Gardner called him on the telephone about 12 o'clock and asked him whether he was supposed to be at the warehouse at 11:30 and he said, "Yes," but he would explain to Eager; that he then told Eager on the telephone that he was unable to be at the warehouse at the appointed hour because the arrangements had not been completed at the bank for the release of the \$55,000 loan and asked him to be back at the warehouse at three o'clock that afternoon, when the \$55,000 check would be there; and that Eager agreed. Eager testified that he told Schlossberg on the telephone that he was "through" and that he was leaving



to by Gardner.

In any event the bank did receive an inventory of goods  
lighter sometime prior to January 22, 1935 and arranged to loan  
\$25,000 on condition that said amount should not be  
paid to Lager until he had returned his warehouse receipt and  
the warehouse company issued new warehouse receipt to Lager,  
which were to be delivered to the bank as security for its loan.  
On January 22, 1935 Lager appeared at the night club and

had a conversation with Schlosberg. While there was a conflict  
in the testimony of the witnesses as to whether Lager sought at  
that time to collect for the liquor already delivered or for  
all of his liquor, it is undisputed that Schlosberg asked Lager  
to meet him at the place of business of the night club  
corporation on the following morning at 11:30 with his warehouse  
receipts, according to Lager, to "sit down and make a deal" and  
according to Schlosberg, so that they could close the deal for  
the \$25,000, which was expected the bank to loan Lager that  
morning.

Lager appeared the following morning at the appointed  
hour at the place of business of the night club corporation for  
correction but Schlosberg did not show up. Schlosberg testified  
that Gardner called him on the telephone about 10 o'clock and  
asked him whether he was prepared to be at the warehouse at  
11:30 and he said, "Yes," but he could not be there; that  
he then told Lager on the telephone that he was unable to be at  
the warehouse at the appointed hour because his warehouse  
had not been completed at the bank for the release of the  
\$25,000 loan and asked him to be back at the warehouse at 11  
o'clock that afternoon, when the \$25,000 check would be issued;  
and that Lager agreed. Lager testified that he told Schlosberg  
on the telephone that he was "through" and that he was leaving

the warehouse at once. It is undisputed that Eager promptly left the warehouse and did not go back there either at three o'clock that afternoon or at any time thereafter. Krooth delivered a certified check for \$55,000 to the office of the Republic Warehouse Corporation at 2:30 P.M. on the same day with instructions that it be turned over to Eager upon his surrender of the warehouse receipts for his liquor. Eager never asked for or picked up the check and he never surrendered his warehouse receipts.

It is conceded that Eager would have accepted the \$55,000 check for his entire stock of liquor if Schlossberg had kept his appointment with him on the morning of January 28, 1946 and it is also conceded that no contract for the purchase of the liquor by Frolics was consummated on said date. There were no further dealings between Eager and Krooth or Schlossberg concerning the purchase of the liquor by Frolics subsequent to January 28, 1946.

Eager contends that "the corporate plaintiff adduced no evidence upon the basis of which the lower court had a right to say that it acquired title to the liquor prior to the replevin." The only question that need be determined is whether a contract for the sale of the liquor was ever consummated.

In order to establish its title to the liquor at and prior to the time this action was instituted, the plaintiff sought to prove that Eager and Krooth entered into an oral contract on or prior to December 17, 1945 for the purchase of the liquor by Frolics.

It is argued strenuously and at length that Eager "dangled" his liquor before Krooth and Schlossberg as an inducement to them to join him in the night club venture. This argument has no bearing on the question as to whether

The witness at once, it is recalled that he was promptly left the warehouse and did not go back until after 11:00 o'clock that afternoon or at any time thereafter. Krohn delivered a certified check for \$25,000 to the office of the Republic Telephone Corporation at 2:30 P.M. on the same day with instructions that it be turned over to Roger when it arrived at the warehouse receipt for his signature. Roger never came for or picked up the check and he never returned at his warehouse receipt.

It is recalled that Roger would have cashed the \$25,000 check for his entire stock of liquor if he had been in the city and his appointment with him on the morning of January 22, 1946 and it is also recalled that no contact on the purchase of the liquor by Prolet was contemplated on said date. There were no further dealings between Roger and Prolet on this date concerning the purchase of the liquor by Prolet subsequent to January 22, 1946.

Later contacts that were supposed to have taken place no reference upon the basis of which the Government has a right to say that it required title to the liquor prior to the "picking". The only question that need be considered is whether a contract for the sale of the liquor was ever consummated. In order to establish its title to the liquor at and prior to the time this action was instituted, the plaintiff sought to prove that Roger and Krohn entered into an oral contract on or prior to December 17, 1945 for the purchase of the liquor by Prolet.

It is argued strenuously and it is argued that Roger "dangled" his liquor before Krohn and he was induced to enter to join him in the night time venture. This argument has no bearing on the question as to whether

or not Eager and Frolics entered into an oral contract for the sale and purchase of the liquor. As has been seen, the evidence does show that Eager told Krooth and Schlossberg that his liquor would be available for purchase by Frolics for use in its night club and it was fully understood by everybody concerned that it was available for purchase upon terms mutually agreeable to Eager and Frolics.

In its attempt to prove the alleged oral contract the corporate plaintiff relied primarily on the testimony of Krooth and Schlossberg that Eager agreed on December 17, 1945 or on some indefinite date prior thereto that he would sell all of his liquor in the warehouse to Frolics for \$55,000, the liquor to be delivered as needed and paid for when delivered, and on the testimony of Krooth, Schlossberg and Weiss that Eager stated in the letter, which he wrote to Yellowley on December 17, 1945, that it was his intention to sell all of his liquor to Frolics.

We will first consider the testimony of Krooth, Schlossberg and Weiss in reference to the statement which they said they saw in the letter written by Eager to Yellowley on December 17, 1945. It is asserted in effect that this statement constituted an admission by Eager that he had sold his liquor to Frolics. According to Krooth, Schlossberg and Weiss, the letter expressed an intention to sell. Eager said that he told Yellowley in the letter that he contemplated selling the liquor to Frolics. As heretofore shown, Yellowley construed the statement in Eager's letter with reference to his liquor as a "proposal to sell." It will be noted that the testimony of Krooth, Schlossberg, Weiss and Eager in reference to the contents of Eager's letter to Yellowley was practically to the same effect. Certainly neither an intention to sell nor a contemplated sale nor a proposal to sell can be considered as a consummated sale.



or not Lager and Trolics entered into an oral contract for the sale and purchase of the liquor. As has been seen, the evidence does show that Lager sold Trolics and Schlosberg that his liquor would be available for purchase by Trolics for use in its night club and it was fairly understood by everybody concerned that it was available for purchase upon terms mutually agreeable to Lager and Trolics.

In its attempt to prove the alleged oral contract the corporate plaintiff relied primarily on the testimony of Trolics and Schlosberg that Lager agreed on December 17, 1942 or on some indefinite date prior thereto that he would sell all of his liquor in the warehouse to Trolics for \$7,500, the liquor to be delivered as needed and paid for when delivered, and on the testimony of Trolics, Schlosberg and Weiss that Lager stated in the letter, which he wrote to Yellowley on December 17, 1942, that it was his intention to sell all of his liquor to Trolics. We will first consider the testimony of Trolics, Schlosberg and Weiss in reference to the statement which they said they saw in the letter written by Lager to Yellowley on December 17, 1942. It is asserted in effect that this statement constituted an admission by Lager that he had sold his liquor to Trolics. According to Trolics, Schlosberg and Weiss, the letter expressed an intention to sell. Lager said that he told Yellowley in the letter that he contemplated selling the liquor to Trolics as heretofore shown, Yellowley construed the statement in Lager's letter with reference to his liquor as a proposal to sell. It will be noted that the testimony of Trolics, Schlosberg, Weiss and Lager in reference to the contents of Lager's letter to Yellowley was practically to the same effect. Certainly neither an intention to sell nor a contemplated sale nor a proposal to sell can be considered as a consummated sale.



The testimony of Krooth and Schlossberg that Eager agreed orally on December 17, 1945 or on some indefinite date prior thereto to sell his entire stock of liquor in the warehouse to Frolics is completely refuted by practically all the other evidence in the record, including their own testimony and that of the plaintiff's witness Weiss.

According to Weiss, the agreement for the sale of the liquor to Frolics was not "completed" because Eager "did not know whether he wanted to make the bill of sale out for 1946 or 1945." Then, to the surprise of the plaintiff's counsel, Weiss testified that Frolics "had a contract" on the 207 cases of liquor that were delivered on December 27, 1945 and that Eager "was supposed to write up a bill of sale" for all the liquor he had in the warehouse.

On December 23, 1945 Krooth certainly did not act or speak upon the assumption of a completed sale of the liquor to Frolics theretofore made under the alleged oral contract, because on that day he recognized Eager's ownership of the liquor and his title thereto by collaborating with him on the terms to be incorporated in a written contract for the purchase of the liquor. Again on the following day, December 24, 1945, Krooth recognized Eager's ownership of and title to the liquor, when he and Eager jointly requested Attorney Sakelson to prepare a written contract for the sale of the liquor to Frolics. He recognized Eager's ownership of and title to the liquor on January 3, 1946, when he returned with Eager to the office of Attorney Sakelson to discuss with the latter the terms of the written contract which he had drafted for the sale of the liquor to Frolics. On January 17, 1946, the plaintiff recognized that Eager owned and had title to the liquor, because on that date, according to Schlossberg and Mandell, they asked Eager to in-

The testimony of Krooth and Schlossberg that Lager agreed orally on December 17, 1945 or on some indefinite date prior thereto to sell his entire stock of liquor in the warehouse to Prolica is completely refuted by Prolica's testimony and that of the Plaintiff's witness Weiss.

According to Weiss, the agreement for the sale of the liquor to Prolica was not "completed" because Lager did not know whether he wanted to make the bill of sale out for 1945 or 1946. Then, to the surprise of the Plaintiff's counsel, Weiss testified that Prolica "had a contract" on the day Lager was delivered on December 22, 1945, and that Lager "was supposed to write up a bill of sale" for all the liquor he had in the warehouse.

On December 22, 1945, Prolica certainly did not set on foot upon the assumption of a completed sale of the liquor to Prolica therefore made under the bill of sale contract, because on that day he recognized Lager's ownership of the liquor and his title thereto by collaboration with him on the terms to be incorporated in a written contract for the purchase of the liquor. Again on the following day, December 23, 1945, Krooth recognized Lager's ownership of and title to the liquor, when he and Lager jointly requested attorney Nathan to prepare a written contract for the sale of the liquor to Prolica. He recognized Lager's ownership of and title to the liquor on January 3, 1946, when he returned with Lager to the office of attorney Nathan to discuss with the latter the terms of the written contract which he had drafted for the sale of the liquor to Prolica. On January 17, 1946, the Plaintiff recognized that Lager owned and had title to the liquor, because on that date, according to Schlossberg and Mandell, they asked Lager to the

struct the warehouse company to prepare an inventory of his entire stock of liquor and deliver a copy thereof to the bank where plaintiff was negotiating a loan of \$55,000 to pay for the liquor. On January 27, 1946 Schlossberg recognized Eager's ownership of the liquor because he asked him on that date to meet him the following morning at the warehouse when he (Schlossberg) would close the deal by paying him (Eager) \$55,000, the proceeds of the bank loan, for his entire stock of liquor, including the 207 cases delivered on December 27, 1945. On January 28, 1946 the plaintiff recognized Eager's ownership of and title to the liquor, because on the afternoon of that day Krooth delivered a certified check for \$55,000 to the warehouse to be turned over to Eager upon the surrender of his warehouse receipts for the liquor. As heretofore shown, Eager did not on that day or at any time thereafter receive or accept said check or surrender his warehouse receipts and there were no further negotiations between Eager and Krooth or Schlossberg for the purchase of the liquor by Frolics.

The only other evidence presented by the plaintiff in its attempt to corroborate the testimony of Krooth and Schlossberg as to the oral contract was the testimony of J. R. Roberts, Michael Stone and Ivan Wilson. Wilson was a bartender at Frolics and Roberts and Stone had the kitchen concession there,

Roberts testified on direct examination that he thought that he heard Eager say that the liquor "went with the deal" and that he had "sold the liquor to Frolics" about December 20, 1945. On cross-examination, however, he testified that he did not know that on the 24th of December, 1945 both Krooth and Eager had gone to a lawyer to have a written contract drawn for the sale of the liquor and that if the uncontradicted evidence was to that effect it would change his mind about what he

that the witnesses appeared to be in a hurry to get out of the  
entire stock of liquor in the following way: on the 1st of  
where plaintiff was residing a lot of 25,000 to get for  
the liquor. On January 27, 1945, plaintiff received a letter  
ownership of the liquor because he said that he had sold to  
meet him the following month at the same time as  
(Tobolsky) would also be in the city.  
\$25,000, the proceeds of the sale of the liquor, which he  
of liquor, including the 25,000 cases, on January 28,  
1945. On January 28, 1945, the plaintiff received a letter  
ownership of the liquor, which he said he had sold to  
on that day (which defendant said was the 28th) he said he  
the witnesses to be turned over to them from the defendant of  
his witness receipts for the liquor. The defendant then  
never did not on that day or at any time thereafter receive of  
accept a lot of liquor in the defendant's name and then  
were no further negotiations between them and the defendant  
Schlossberg for the purchase of the liquor by plaintiff.  
The only other witness present in the building in  
its attempt to corroborate the testimony of plaintiff and  
Schlossberg as to the oral contract and the receipt of  
J. H. Roberts, Michael for the liquor. Plaintiff was a  
particular of plaintiff and Roberts and then the witness  
concession there.  
Roberts testified on direct examination that he thought  
that he heard plaintiff say that the liquor was sold to him  
and that he had "sold the liquor to plaintiff" about December 30,  
1945. On cross-examination, however, he testified that he did  
not know that on the 28th of December, 1945, both Brown and  
Lager had gone to a lawyer to have a written contract drawn  
for the sale of the liquor and that if the uncontradicted evi-  
dence was to that effect it would change his mind about what he

testified he heard Eager say as to the sale of the liquor on December 20, 1945.

Stone testified that Eager "returned from his lawyer and he says, 'the deal was going along fine'"; that "his liquor stock went with the deal"; and that after the place was in operation a week or two he heard Eager say he had sold his liquor to Frolics. Wilson testified that Eager told him on the 27th of December, 1945, that "all the whiskey I have belongs here."

The testimony of Roberts and Stone that they heard Eager say that his liquor went "with the deal" could not have been true, because, as already shown, the preorganization contract made no reference to Eager's liquor. As to Stone's testimony that Eager said that "the deal was going along fine" after "he returned from his lawyer," Eager may well have thought that it was, after he and Krooth had conferred with Attorney Sakelson for the purpose of having a written contract prepared for the sale of the liquor to Frolics. The testimony of Wilson that Eager told him on December 27, 1945 that "all the whiskey I have belongs here" and that of Stone that he heard Eager say a week or two after the night club opened that he had sold his liquor to Frolics is so highly improbable that it is unbelievable. It will be noted that the night club opened on December 27, 1945 and that a week or two thereafter would be the period from January 3, 1946 to January 10, 1946. It is hardly likely that Eager would tell Wilson on December 27, 1945 that "all the whiskey I have belongs here [to Frolics]," when at that very time he was attempting to negotiate a written contract for the sale of his liquor to the plaintiff, which contract was then being drafted by Attorney Sakelson, and it is just as unlikely that he would tell Stone on January 3, 1946 or at any time between that date



testified he heard Lager say as to the sale of the liquor on December 29, 1944.

Stone testified that when "Lawson told his lawyer and he says, 'the deal was going along fine'; that this liquor stock went with the deal; and that after the deal was in operation a week or two he heard Lager say he had sold this liquor to Prolics. Wilson testified that when told this on the 27th of December, 1944, that 'all the whiskey I have belongs here.'

The testimony of Prolics and Stone that they heard Lager say that his liquor went "with the deal" could not have been true, because, as already shown, the original transaction contract made no reference to Lager's liquor. As to Stone's testimony that Lager said that "the deal was going along fine" after the returned from his lawyer," Lager may well have thought that it was, after he and Lawson had conferred with Attorney Lawson for the purpose of having a written contract prepared for the sale of the liquor to Prolics. The testimony of Wilson that Lager told him on December 29, 1944, that "all the whiskey I have belongs here" and that of Stone that he heard Lager say a week or two after the night club opened that he had sold his liquor to Prolics is so directly contradictory that it is unbelievable, it will be noted that the night club opened on December 29, 1944, and that a week or two thereafter would be the period from January 5, 1945 to January 10, 1945. It is hardly likely that Lager would tell Wilson on December 29, 1944, that "all the whiskey I have belongs here [to Prolics]," when at that very time he was attempting to negotiate a written contract for the sale of his liquor to the plaintiff, which contract was then being drafted by Attorney Lawson, and it is just as unlikely that he would tell Stone on January 3, 1945 or at any time between that date

and January 10, 1946 that he had sold his liquor to Frolics, when he did not know himself at that time whether the Sakelson contract, which had been received by Krooth on January 3, 1946, would be signed by the officers of Frolics, Inc.

Eager, Krooth and Schlossberg were experienced business men, all of them having theretofore been engaged in the liquor business, and it is fair to assume that they would conduct their affairs rationally. If Krooth thought that the parties had already made an oral contract for the sale of Eager's liquor to Frolics, would he not have considered it a work of supererogation to negotiate with Eager six days later concerning the terms to be incorporated in a written contract for the sale of the liquor? The only reasonable conclusion that can be drawn from the evidence as to Krooth's conduct in this regard was that any negotiations theretofore had concerning the purchase of Eager's liquor were merely preliminary and tentative and that both parties contemplated that it would be sold under a written contract, particularly if the \$55,000 purchase price was to be paid in installments. We think that the facts and circumstances in evidence with reference to the conduct of Krooth in connection with the Sakelson contract are sufficient in themselves to negative the existence of a prior oral contract.

In our opinion, the evidence shows conclusively that no contract, oral or written, for the sale of the liquor by Eager to Frolics was ever consummated and therefore the title to Eager's liquor in the defendant's warehouse was never transferred to Frolics, Inc.

Some other points are argued by counsel for the plaintiff in respect to the alleged oral contract but, since they are predicated upon the existence of an unconditional oral contract for the sale of all the liquor in the warehouse, we

and January 10, 1946 that he had sold his liquor to Trolics, when he did not know himself at that time whether the said-son contract, which had been received by Knoot on January 3, 1946, would be signed by the officers of Trolics, Inc. Eger, Knoot and Ekolschberg were experienced business

men, all of them having theretofore been engaged in the liquor business, and it is fair to assume that they would conduct their affairs rationally. If Knoot thought that the parties had already made an oral contract for the sale of Eger's liquor to Trolics, would he not have considered it a sort of negotiation to negotiate with Eger six days later concerning the terms to be incorporated in a written contract for the sale of the liquor? The only reasonable conclusion that can be drawn from the evidence as to Knoot's conduct in this regard was that any negotiations theretofore had concerning the purchase of Eger's liquor were merely preliminary and tentative and that both parties contemplated that it would be sold under a written contract, particularly in the light of the fact that it was to be paid in installments. We think that the facts and circumstances in evidence with reference to the conduct of Knoot in connection with the Ekolschberg contract are sufficient in themselves to negative the existence of a prior oral contract.

In our opinion, the evidence shows conclusively that no contract, oral or written, for the sale of the liquor by Eger to Trolics was ever consummated and therefore the title to Eger's liquor in the defendant's warehouse was never transferred to Trolics, Inc.

Some other points are argued by counsel for the plaintiff in respect to the alleged oral contract but, since they are predicated upon the existence of an unconditional oral contract for the sale of all the liquor in the warehouse, we

deem it unnecessary to discuss them.

It is contended by Frolics that "no credence should be given to the testimony of Harry Eager" because "he was impeached by himself" and a number of other witnesses. We have carefully examined the testimony of all the witnesses in this case and are inclined to agree that Eager's testimony was false in many respects. We think that it also may be said that the testimony of Krooth and Schlossberg was false in many respects, because they too were impeached by their own testimony and that of each other, as well as by the testimony of the plaintiff's witness Weiss. However, even though Eager's testimony is disregarded in its entirety and eliminated from consideration, the evidence of the plaintiff alone shows that no oral contract was made on or prior to December 17, 1945 for the sale of the liquor to Frolics.

We are mindful of the rule that the findings of a trial court should not be disturbed by a court of review unless they are against the manifest weight of the evidence but we are also mindful of the rule that where, as here, the findings of the trial court are against the manifest weight of the evidence, it is the duty of this court to reverse the judgment entered upon such findings.

In the view we take of the evidence, it would serve no useful purpose to retry this case. Therefore, for the reasons stated herein the judgment of the Superior court of Cook county is reversed and the cause remanded with directions that judgment be entered finding that Harry Eager, the intervening petitioner, was the lawful owner of the merchandise involved herein and entitled to the possession thereof at and prior to the time it was replevied by the plaintiff, Frolics, Inc., and that such further proceedings be had as are appropriate and not inconsistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.  
Friend, P. J., and Scanlan, J., concur.

been it unnecessary to discuss them.

It is contended by Troites that the evidence should

be given to the testimony of Harry Meyer because "he was impeached by himself" and a number of other witnesses. We

have carefully examined the testimony of all the witnesses in this case and are inclined to give the testimony of Troites

more weight in many respects. It is true that it is also

to be said that the testimony of Troites and Meyer is

false in many respects, because they are impeached by

their own testimony and that of other witnesses. It will be the

testimony of the plaintiff's witnesses, however, even

though Meyer's testimony is impeached in its entirety and

eliminated from consideration, the evidence of the plaintiff

alone shows that no oral contract was made on or prior to

December 15, 1945 for the sale of the land to Troites.

We are mindful of the rule that the findings of a

trial court should not be disturbed by a court of review

unless they are against the manifest weight of the evidence

but we are also mindful of the rule that, as here, the

findings of the trial court are subject to the manifest weight

of the evidence, it is the duty of this court to reverse

the judgment entered upon such findings.

In the view we take of the evidence, we would reverse

no useful purpose to retry this case. Therefore, for the

reasons stated herein the judgment of the majority court of

Cook County is reversed and the case remanded with directions

that judgment be entered finding that Harry Meyer, the latter

verging petitioner, was the lawful owner of the merchandise

involved herein and entitled to the possession thereof at

and prior to the time it was replied by the plaintiff,

Troites, Inc., and that such further proceedings be had as

are appropriate and not inconsistent with this opinion.



44061

ROBERT S. EDMONDS and  
 GEORGE S. ROBINSON, Appellees,

v.

GEORGE HEIL and MYRTLE G.  
 HEIL, Appellants.

)  
 )  
 ) APPEAL FROM SUPERIOR  
 ) COURT, COOK COUNTY.  
 )

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

By this appeal defendants, George Heil and Myrtle G. Heil, seek to reverse a judgment for \$5500 entered against them and in favor of George S. Robinson. The defendants filed a separate appeal, Appellate Court General Number 44060, from a judgment for \$8200 entered against them and in favor of Robert S. Edmonds.

A single complaint was filed by the plaintiffs, Edmonds and Robinson, against Florence K. Burnham and her agents, George Heil and Myrtle G. Heil, to recover damages for the destruction of their furniture, fixtures and other personal property as the result of a fire in the building in which plaintiffs resided with their families. The suit was dismissed as to Florence K. Burnham, the owner of the building, for want of service of process. The case was tried before the court and a jury. Two verdicts were returned by the jury, one finding defendants guilty as to the plaintiff Edmonds and assessing his damages at \$8200 and the other finding defendants guilty as to the plaintiff Robinson and assessing his damages at \$5500. The judgments appealed from were entered on the respective verdicts.

The appeal in this case was consolidated for hearing in this court with the appeal perfected in case No. 44060. The opinion in case No. 44060 is filed concurrently with

3331A 648

44061

ROBERT S. EDMONDS and  
GEORGE S. ROBINSON,  
Appellees,

v.

GEORGE NEIL and MYRTLE G.  
NEIL,  
Appellants.

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

MR. JUSTICE CAMPBELL DELIVERED THE OPINION OF THE COURT.  
By this appeal defendants, George Neil and Myrtle

G. Neil, seek to reverse a judgment for \$500 entered

against them and in favor of George S. Robinson. The

defendants filed a separate appeal, Appellate Court

General Number 44060, from a judgment for \$800 entered

against them and in favor of Robert S. Edmonds.

A single complaint was filed by the plaintiffs,

Edmonds and Robinson, against Florence K. Barnham and her

agents, George Neil and Myrtle G. Neil, to recover damages

for the destruction of their furniture, fixtures and other

personal property as the result of a fire in the building

in which plaintiffs resided with their families. The suit

was dismissed as to Florence K. Barnham, the owner of the

building, for want of service of process. The case was tried

before the court and a jury. Two verdicts were returned by

the jury, one finding defendants guilty as to the plaintiff

Edmonds and assessing his damages at \$800 and the other

finding defendants guilty as to the plaintiff Robinson and

assessing his damages at \$500. The judgments appealed from

were entered on the respective verdicts.

The appeal in this case was consolidated for hearing

in this court with the appeal perfected in case No. 44060.

The opinion in case No. 44060 is filed concurrently with

this opinion. The same questions were presented for review in that case as in this case. Our decision in that case (Edmonds et al. v. Heil et al.) is controlling in this case and for the reasons stated therein the judgment of the Superior court of Cook county in favor of plaintiff, George S. Robinson, and against the defendants is affirmed.

JUDGMENT AFFIRMED.

Friend, P. J., and Scanlan, J., concur.

this opinion. The same questions were presented for review in that case as in this case. See Johnson v. State (1904) 101 Cal. 100, 34 P. 221. It is respectfully suggested that the reasons stated therein for the reversal of the judgment of the court of appeals in Johnson v. State, 101 Cal. 100, 34 P. 221, are controlling in this case.

Very respectfully,  
 J. J. Johnson.

Witness my hand and seal this 1st day of June, 1904.

43966

PETER S. BARLAS,

Appellant,

v.

PETER GEORGE LIAKOPOULOS, GUST  
SCOPOS, and PETER N. KARABATSOS,

Appellees.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

338 L.A. 648

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action for attorney's fees. The original complaint filed November 14, 1945 consisted of four counts. Afterwards, on motion of the defendants, counts two, three and four were stricken and plaintiff was given leave to amend. Plaintiff amended counts three and four. Count one remained in its original form. The third amended count three of the amended complaint is the only count naming Peter N. Karabatsos as a defendant.

On September 9, 1946, on motion of defendant Karabatsos, an order was entered striking the third amended count three of the amended complaint, and dismissing the cause, as to defendant Karabatsos. Defendant Liakopoulos filed a counterclaim against defendant Scopos. Issues were joined on the counterclaim and also on the amended complaint.

On September 10, 1946, plaintiff filed his notice of appeal from the order of September 9, 1946. After this notice of appeal was filed certain orders were entered, including the severance of the issues between Karabatsos and defendants Liakopoulos and Scopos. Subsequently the cause was tried by the court without a jury. On the counterclaim of Liakopoulos the court found that plaintiff had no attorney's lien and that no fees were due plaintiff from Liakopoulos or Scopos, and the court dismissed the complaint for want of prosecution.



UNITED STATES

DISTRICT

COURT

IN RE: THE ESTATE OF JAMES EARL RAY, DECEASED, AND IN RE: A PETITION FOR WRIT OF HABEAS CORPUS.

MEMORANDUM

JAMES EARL RAY

ON PETITION FOR WRIT OF HABEAS CORPUS, filed by the petitioner, JAMES EARL RAY, on or about the 10th day of

this month, the Court has considered the petition and the following facts are stated:

The petitioner, JAMES EARL RAY, was born on or about the 10th day of

January, 1924, at St. Louis, Missouri, and is now residing at the same place.

The petitioner is a white male, of legal age, and is now residing at the same place.

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The petitioner is a white male, of legal age, and is now residing at the same place.

On September 2, 1968, on or about the 10th day of

September, 1968, the petitioner, JAMES EARL RAY, was arrested by the St. Louis Police Department, and is now residing at the same place.

The petitioner is a white male, of legal age, and is now residing at the same place.

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The petitioner is a white male, of legal age, and is now residing at the same place.

By this appeal plaintiff seeks to reverse the order of September 9, 1946 striking the third amended count three, and dismissing the cause, as to defendant Karabatsos. Plaintiff also seeks to reverse all orders entered in this cause subsequent to September 10, 1946 when he filed his first notice of appeal.

The record discloses that amended count three alleges in substance that defendants Liakopoulos and Scopos, copartners in a tavern in the City of Chicago, became involved in disputes with respect to the conduct of the tavern business; that Liakopoulos asked for an accounting and dissolution of the partnership; that plaintiff, an attorney, entered into an oral contract with Liakopoulos to represent him in the controversy involving Scopos; that Liakopoulos agreed to pay the plaintiff for his services one-third "of all sums of money or amount" received by Liakopoulos for his share of the partnership; that Liakopoulos paid the plaintiff \$150 as a retainer; that plaintiff effected a settlement of the affairs of the partnership and that defendant Liakopoulos received the sum of \$4,500 from the defendant Scopos; that defendants Liakopoulos, Scopos, and Karabatsos conspired "for the purpose of cheating and defrauding" plaintiff of his fees. Plaintiff claims that there is due him as fees \$1,500 representing one-third of the sum paid by Scopos to Liakopoulos, statutory interest from August 31, 1945, and punitive damages amounting to \$5,000.

Plaintiff's theory is that when he filed a notice of appeal on September 10, 1946 from the order sustaining defendant Karabatsos' motion to strike the third amended count three, the trial court lost jurisdiction, and that therefore all orders entered by the trial court subsequent to the filing of the notice of appeal are null and void.

[illegible][illegible]

of the fact that the Government has not been able to obtain the necessary evidence to prove the charges against the accused. The Government has not been able to obtain the necessary evidence to prove the charges against the accused. The Government has not been able to obtain the necessary evidence to prove the charges against the accused.

Defendants maintain that the order of September 9, 1946 terminating the case as to defendant Karabatsos was interlocutory and not final and appealable. The law is well established that a judgment is appealable only when it terminates the litigation between all of the parties on the merits, and when, if affirmed, the court which has rendered it has only to proceed with its execution. (Free v. The Successful Merchant, 342 Ill. 27.) In the instant case it is uncontroverted that when the complaint was dismissed as to defendant Karabatsos there was left for consideration all questions raised between plaintiff and defendants Liakopoulos and Scopes, and also between Liakopoulos and Scopes on the counterclaim of Liakopoulos. Since the order of September 9, 1946 upon which the first notice of appeal was based disposed of amended count three as to Karabatsos only but did not make a final disposition of the count as to Liakopoulos and Scopes, it is not appealable. (Walters v. Merc. Nat. Bank of Chicago, 380 Ill. 477; Sheaff v. Spindler, 339 Ill. 540; Nelson, etc. v. Powroznik, et al., 329 Ill. App. 647.)

The record discloses that plaintiff's counsel was present at the trial but did not participate nor offer any proof to establish the allegations of the complaint; and that defendants Liakopoulos and Scopes both testified in their own behalf. In his reply brief plaintiff says that defendant Liakopoulos "never answered in his evidence the charges of collusion and fraud or showed whether plaintiff had or had not performed the work or that his settlement was not the result of plaintiff's work." The evidence shows that plaintiff agreed to handle the partnership settlement and dissolution for \$150, which was subsequently paid. Moreover, at the trial plaintiff made no objection to the sufficiency of the evidence but refused to take part on the theory that the jurisdiction of this court had attached. The question of insufficiency of the proof cannot be raised for the first time in this

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court. (Murphy v. City of Chicago, 318 Ill. App. 166.)

It appears that on September 11, 1946, the day after the first notice of appeal was filed, an order was entered severing the issues as to Liakopoulos and Scopus. Plaintiff urges that since defendants' amended count three alleges a conspiracy involving all the defendants the action could not be severed without prejudice to plaintiff. We think plaintiff's position is untenable. When the complaint was dismissed as to Karabatsos that order eliminated him from the case. This was in effect a severance. The subsequent entry of an order which purported to sever the issues was superfluous and immaterial for the reason that Karabatsos was no longer a party.

Inasmuch as we hold that the order of September 9, 1946 striking the third amended count three and dismissing the complaint as to defendant Karabatsos is not a final appealable order, it follows that jurisdiction of the cause remained in the trial court.

We have considered the other points urged and the authorities in support thereof but in the view we take of this case we deem it unnecessary to discuss them.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.



44079

JOHN P. KLUFETOS,

Appellee,

v.

THOMAS J. FRIEL and CHARLES C.  
RENSHAW, as Trustees, etc., et al.,  
doing business as CHICAGO SURFACE  
LINES,

Appellants.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

3331A 449

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages alleged to have been sustained by plaintiff as a result of defendants' negligence in starting a street car while plaintiff was in the act of boarding it. There was a jury trial and verdict for \$4,000. Upon plaintiff's acceptance of a remittitur by the court of \$1,500, defendants' motion for a new trial was denied and judgment was entered in favor of plaintiff for \$2,500.

On March 6, 1945 plaintiff visited one Philip Bentas, a friend who had been ill and who resided at 267 North Pulaski Road near the intersection of Lake Street in the City of Chicago, Illinois. Leaving his friend's home about four o'clock in the afternoon, plaintiff walked to the east sidewalk of Pulaski Road where he waited for a northbound street car. When the northbound street car came to the intersection it stopped and, according to plaintiff's theory, while the street car was standing still he took hold of the center bar on the rear platform with his right hand and placed his left foot on the step, at which time the street car started forward, causing him to fall on the street.

Defendants' theory is that plaintiff attempted to board the street car while it was in motion.

JOHN F. KENNEDY

Legation,

Y.

THOMAS J. PAUL AND WALTER J. KENNEDY, JR. (KIDNAPERS, etc., et al.)  
 GOING AGAINST THE COURSE OF JUSTICE  
 CIVIL

Continued.

RE. REMITTANCE ORDER: This application was made on 14th May.

This is an application for a writ of habeas corpus.

When considered by the court as a matter of course, the court

is satisfied that the writ should be granted and the writ is

granted. There is a writ of habeas corpus for 14th May.

Application for a writ of habeas corpus for 14th May.

Application for a writ of habeas corpus for 14th May.

Application for a writ of habeas corpus for 14th May.

ON 14th May, 1964, the court granted a writ of habeas corpus.

A writ of habeas corpus was granted on 14th May 1964.

There is a writ of habeas corpus for 14th May 1964.

Application for a writ of habeas corpus for 14th May.

Application for a writ of habeas corpus for 14th May.

Application for a writ of habeas corpus for 14th May.

Application for a writ of habeas corpus for 14th May.

Application for a writ of habeas corpus for 14th May.

Application for a writ of habeas corpus for 14th May.

Application for a writ of habeas corpus for 14th May.

Application for a writ of habeas corpus for 14th May.

The writ of habeas corpus is granted.

As grounds for reversal, defendants urge (1) that the verdict is against the manifest weight of the evidence; (2) that the damages awarded are excessive notwithstanding the remittitur; and (3) that certain given instructions are defective.

Plaintiff testified that he left the Rentas residence accompanied by Rentas about 3:30 or 4:00 o'clock in the afternoon, intending to board a northbound street car on Pulaski Road; that "three or four or five people" were waiting at the intersection to board the car and got on ahead of him; that while the northbound street car was standing at the intersection he "got hold of the center bar, put one foot on," and while in this position the street car started with "a violent jerk", causing him to fall; and that there being no doctor in the immediate vicinity a "street car man" put him on the northbound street car and later took him to a doctor's office.

Philip Rentas, called by the plaintiff, testified that on the afternoon of the occurrence it was cloudy, dark, and "kind of mist-rain"; that while witness and the plaintiff were waiting for a street car two cars appeared; that the first street car to come to the intersection was crowded and plaintiff did not attempt to board it; that when the second street car stopped at the intersection he saw the plaintiff and three other people board it, the plaintiff being the last one to get on; that plaintiff "got hold of the bar in the back of the car and put his foot on and the street car pulled away," whereupon the plaintiff "slipped and fell backwards."

The motorman and conductor of the car and two passengers testified in behalf of the defendants.

George Deasy, the motorman, testified that the street car stopped at the intersection of Lake Street about 4:00 p.m.; that it had snowed and the street was slushy; that as the car was





crossing Lake Street he received an emergency stop signal and stopped north of the intersection; that he looked out and saw the conductor talking to a man; that he did not see the accident happen.

John Zimmer, the conductor, testified that when the motorman gave the signal that the traffic light was changing he looked out to see if there were any more passengers waiting to board the street car and seeing none he "gave the bell and we started up"; that when the street car had traveled about "ten feet or so, this man started to jump on the car and he fell off"; and that when the plaintiff attempted to board the street car it was going about seven to ten miles an hour and that plaintiff "was running against the car and he grabbed for the rear handle and he did not make it."

Thomas E. Atwood testified that as he neared the street car in question he observed two men five or ten feet in front of him; that one of them made "a rush for the street car" after it started up; that the street car was going seven or eight miles an hour and had traveled ten or fifteen feet before the man (plaintiff) "made a grab for it" and that as the street car was going by plaintiff "grabbed the end post, not the middle or the front one, but the back one" and was thrown backwards.

Joseph Radosta, a passenger, testified that he boarded the street car at the intersection and remained on the back platform; that after the street car started "I seen a fellow come running toward the back end of the car; I would say he was in the middle of the street when I saw him; all of a sudden he came running to the back of the car and grabbed the back handle; the man definitely did not get his feet on the step, he just twisted over."



There is a direct conflict between the testimony of the plaintiff's witnesses and that of the defendants' witnesses as to whether the street car involved was standing still when the plaintiff was in the act of boarding it.

On the record before us we cannot say that the verdict is against the manifest weight of the evidence. The trial court and jury who heard and saw the witnesses were in a better position than this court to determine the weight of the testimony and the credibility of the witnesses. (Miller v. Cummings, 323 Ill. App. 297; Elmore v. Cummings, 321 Ill. App. 234; Philpott v. Parham, 316 Ill. App. 278.)

As to the damages, the evidence shows that in the evening, shortly after the accident, plaintiff was examined by Dr. Harry N. Petrakos who found that plaintiff had a fractured left wrist, sprain of the left elbow and shoulder, and contusions of the lower chest wall. On the following morning an X-ray was taken of plaintiff's wrist, which revealed a fracture of the distal portion of the radius. At that time a plaster cast was applied from the elbow to the knuckles, which was removed about six weeks afterward. At the time of the trial (September, 1945) there was a deformity of the wrist caused by swelling and a weakness of the wrist and hand. Dr. Petrakos testified that the plaintiff suffered a permanent disability of the hand of "10 or 15 per cent".

At the time of the accident plaintiff was fifty-four years of age. He had been employed for several years prior to the injury as a cook and was earning \$50 a week. His loss of earnings covered a period of about three months and he paid his physician one Hundred dollars for medical services.

In view of the nature of the plaintiff's work as shown by the evidence, which requires the lifting and handling of heavy objects, we do not think that the damages can be considered excessive. So far as the record shows no attempt was made to refute the testimony of Dr. Petrakos that the injury to the plaintiff's hand



There is a direct conflict between the testimony of the plaintiff's witnesses and that of the defendant's witnesses as to whether the stated and alleged facts actually took place. Plaintiff was in the act of shooting it.

On the record before me as shown and stated the conflict is explained the conflict of the evidence. The fact that the jury was heard and saw the witness was in a position to see this court is determining the value of the testimony and the credibility of the witnesses. Plaintiff v. Defendant, 101 Ill. App. 2d 100, 101; Plaintiff v. Defendant, 101 Ill. App. 2d 100, 101; Plaintiff v. Defendant, 101 Ill. App. 2d 100, 101.

As to the defendant, the witness shows that in the event, thereby that the defendant, plaintiff, is examined by Dr. Harry A. Peterson who found that plaintiff had a fractured left wrist, sprain of the left elbow and shoulder, and contusions of the lower chest wall. On the following morning on - they were taken to Little's office, which revealed a fracture of the right radius. At that time a physician said the condition of the elbow to the knuckles, which was severely injured by a blow at the time of the trial (contusion, laceration) there was a fracture of the wrist caused by swelling and a fracture of the wrist and hand. Dr. Peterson testified that the plaintiff suffered a compound disability of the hand of "10 to 15 per cent".

At the time of the accident plaintiff was fifty-four years of age. He had been employed for several years in the same office as a clerk and was earning \$20 a week. His loss of earning power a period of about three months and he had his reputation and credit ruined for medical services.

In view of the nature of the plaintiff's work as shown by the evidence, which requires the lifting and handling of heavy objects, we do not think that the damages can be considered excessive so far as the record shows no amount was made to return the testimony of Dr. Peterson that the injury to the plaintiff's hand



is permanent. The fixing of the amount of damages is peculiarly within the province of the jury. (Ford v. Friel, 330 Ill. App. 136; Mueth v. Jaska, 302 Ill. App. 289.)

Notwithstanding the remittitur, the evidence does not show that the jury was influenced by prejudice or passion, nor does it appear after deducting plaintiff's actual loss in wages and medical expense that the sum left is excessive or unreasonable to compensate plaintiff for the impairment in the use of his hand during the remainder of his life.

Defendants maintain that the court erred in giving plaintiff's instructions 1 and 7. As to instruction 1, defendants say that it makes no distinction between boarding a street car which was standing still and one in motion, and that in effect it told the jury that the plaintiff was a passenger if he was boarding the street car in question. The part of the instruction complained of reads: "If you believe from the preponderance of the evidence that the plaintiff was a passenger boarding the street car in question \* \* \*." Since the plaintiff's recovery is conditioned, among other things, upon the jury's finding from a preponderance of the evidence that plaintiff was a passenger, we do not see how the jury could be misled as in Lavander v. Chicago City Ry. Co., 296 Ill. 284, cited by defendants where the instruction assumed that plaintiff was a passenger. We think this contention is without merit. An instruction similar to plaintiff's instruction No. 7 was approved of in Thompson v. Northern Hotel Co., 256 Ill. 77.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

is permanent. The fixing of the amount of damages is particularly  
within the province of the jury. (York v. York, 230 Ill. 400.)

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show that the jury was influenced by prejudice or passion, but that

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44132

ROBERT McCORMICK,

Appellee,

v.

JOHN CARTER,

Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

3351A. 649

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action in forcible entry and detainer. The trial court found and entered judgment in favor of plaintiff. Defendant appeals. The premises in controversy are known as 242 West 51st Street, Chicago, and are improved with a two-story frame building.

Defendant contends that he entered into possession of the premises as a vendee under the terms of a written agreement to purchase.

The evidence shows that on January 16, 1946 defendant executed a written agreement to purchase the premises from plaintiff for the sum of \$1,600; that defendant paid \$400 as earnest money, which was retained by one Steele Smith a real estate broker; that the agreement provided for the payment of the purchase price in monthly installments of \$40 each until total payments aggregated \$600, whereupon plaintiff was to convey the premises by warranty deed to defendant; and that defendant was to execute and deliver simultaneously to plaintiff a mortgage on the premises for any unpaid purchase price at the time of conveyance.

The evidence further shows that defendant took possession of the premises on the day following the execution of the purchase agreement. Shortly thereafter he leased the first floor to a tenant from whom he collected rental monthly. No payments have been made, nor have any been tendered by defendant to plaintiff on account of the purchase agreement, nor has plaintiff received any

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rental from defendant or his alleged tenant for the use and occupancy of the premises.

The purchase agreement also provides that plaintiff sold the premises subject to, among other things, "clearing title." This provision appears written in ink directly above plaintiff's signature. Plaintiff never furnished defendant any indicia of title or ownership, nor does the evidence show that he was able to clear the title. And, so far as the record shows, the purchase was never consummated. An examination of the purchase agreement fails to disclose any provision giving defendant a right to immediate possession of the premises.

Where, as here, the agreement is neither ambiguous nor uncertain, the legal effect of the agreement presents a question of law. (Bentley v. Merchants Matrix Cut Syndicate, 328 Ill. App. 589; Bertlee Co., Inc. v. Illinois Pub. & Print. Co., 320 Ill. App. 490.) We therefore hold as a matter of law that defendant had no right to take possession of the premises as a vendee by virtue of the purchase agreement.

Defendant maintains that plaintiff failed to prove actual prior possession of the premises, and that his possession was invaded by defendant. Since defendant insists that his right to take and hold possession of the premises is based solely on the terms of the purchase agreement he is estopped from denying plaintiff's prior possession. (Leshner v. Sherwin, 86 Ill. 420.)

As to defendant's entry, plaintiff testified that he did not authorize defendant or any other person to enter, and that defendant gained access by breaking into the premises. Defendant testified that plaintiff's daughter gave him the keys to the premises. From the evidence, we think the trial court could find that defendant made a forcible and illegal entry.

We have considered the other points urged and the authorities cited in support thereof but in the view we take of this case we deem it unnecessary to discuss them.

For the reasons assigned, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.





44150

VICTOR C. BREYTSpraak,

Appellant,

v.

MARTIN M. GORDON and PATRICIA  
GORDON,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

3381A. 350 78

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for malicious prosecution of a civil suit. Plaintiff appeals from an order sustaining defendants' motion to strike his amended complaint and dismissing the cause.

On March 11, 1947 plaintiff filed his amended complaint alleging in substance that in March 1930, in New York City, defendants entered into an oral agreement to purchase from plaintiff and one Dr. Walter H. Eddy the exclusive right to manufacture a vitamin product called "Vitalert" and agreed to pay them the sum of \$50,000 as royalties, payable out of gross sales; that defendants paid plaintiff and Dr. Eddy \$1,000 for services rendered by plaintiff in marketing "Vitalert"; that afterwards a written contract was prepared by defendants' lawyer, differing materially from the oral agreement in that it provided for the payment of royalties out of net profits instead of out of gross sales; that the written contract was rejected by plaintiff; and that after defendants had abandoned the contract they demanded refund of the \$1,000 paid by them to plaintiff.

The amended complaint further alleges that the defendants "for the unlawful, illegal, and fraudulent purpose of making it expensive and hard for the plaintiff herein to defend himself" instituted suit in Cook County, knowing that the plaintiff resided in McHenry County, Illinois, and was employed in New York City;

VICTOR G. KELLY, JR.

WILLIAM

V.

NATHAN W. KIMBLE AND FAMILIES  
GORDON

WILLIAM

88344-650

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that plaintiff retained a lawyer, one James Rich, who was afterward drafted into the Armed Forces; that defendants "fraudulently, wantonly, and maliciously set the cause for hearing without proper notice to Rich and unknown to plaintiff secured a judgment by default on April 1, 1943 in the sum of \$1,200"; that defendants caused execution to be issued after thirty days and directed the sheriff to return it immediately "no property found"; that defendants garnisheed plaintiff's salary by serving garnishee summons on the Chicago branch of his employer; that as a result plaintiff lost his position; that plaintiff was compelled to expend large sums of money for attorney's fees for the purpose of vacating the judgment of April 1, 1943 and releasing the garnisheed funds amounting to \$541.67; and that on January 17, 1944 the judgment obtained on April 1, 1943 was vacated.

The amended complaint further alleges that on February 6, 1945 defendants persisting in their "malicious purpose of extorting large sums of money" from plaintiff, recovered a new judgment; that subsequently this judgment was reversed without remandment in this court in M. M. Gordon and P. Gordon v. Victor C. Breyspraak, 328 Ill. App. 581; that, as a direct result of defendants' "illegal, unlawful, and malicious conduct", plaintiff incurred heavy expenses for attorney's fees, stenographers' and printers' charges; the loss of salary; and the use of his funds while tied up by the garnishment proceedings.

As grounds for striking the amended complaint, defendants averred that the complaint fails to state a cause of action for malicious prosecution, or abuse of process.

From the pleadings it appears that in the original suit there were two judgments entered against plaintiff. The first judgment was entered by default and later vacated, and the second



that plaintiff retained a lawyer, one Isaac Klein, who was afterwards drafted into the armed forces; that defendant "intentionally, wantonly, and maliciously set the wheels for having plaintiff receive notice to show and answer to plaintiff's complaint a judgment by default on April 1, 1943 in the sum of \$1,000"; that defendant caused execution to be issued after thirty days and directed the sheriff to return it immediately "as property taken"; that defendant furnished plaintiff's salary by various methods known on the Chicago branch of his employer; that as a result plaintiff lost his position; that plaintiff was compelled to accept large sums of money for attorney's fees for the purpose of avoiding the judgment of April 1, 1943 and retaining his employment; that defendant, amounting to \$111.97; and that on January 17, 1944 the judgment obtained on April 1, 1943 was vacated.

The amended complaint further alleges that on January 6, 1943 defendant persisted in their "malicious conduct of extending large sums of money" from plaintiff, recovered a new judgment; that subsequently this judgment was reversed without payment in this court in U. S. Gordon and E. Gordon v. Victor W. Hoffmann, 111. App. 2d; that, as a direct result of defendant's "intentional, wantonly, and malicious conduct", plaintiff incurred heavy expenses for attorney's fees, stenographers, and witnesses' charges; the loss of salary; and the use of his home while tied up by the proceedings.

As grounds for setting the amended complaint, defendant avers that the complaint fails to state a cause of action for malicious prosecution, or abuse of process.

From the findings it appears that in the original writ there were two judgments entered against plaintiff. The first judgment was entered by default and later vacated, and the second



was entered after a full hearing on the merits. In Schwartz v. Schwartz, 366 Ill. 247, the court held, at page 260, that one of the essentials of an action for malicious prosecution is that the prior litigation complained of shall have terminated in favor of the defendant therein. A suit for malicious prosecution of a civil suit without probable cause cannot be maintained where the action upon which it is grounded is an ordinary civil action, begun by summons and not accompanied by arrest of the person or seizure of his property or by special injury not necessarily resulting in any and all suits prosecuted to recover for like causes of action. (Norin v. Scheldt Manf. Co. 297 Ill. 521; Bonney v. King, 201 Ill. 47; Smith v. Michigan Buggy Co., 175 Ill. 619.)

In the original proceeding upon which the present action is based the court had jurisdiction of defendant (plaintiff here) and the subject-matter, and so far as appears from the amended complaint the former suit was an ordinary civil action begun by summons to recover from plaintiff the sum of \$1,000 paid to him and Dr. Eddy by defendants.

On defendants' motion to strike all of the facts well pleaded in the amended complaint must be regarded as being true. We think that the judgments entered in the original proceeding are conclusive evidence of probable cause notwithstanding the subsequent reversal in this court. (Crescent Live Stock Co. v. Butchers' Union, 120 U. S. 141.)

Plaintiff contends that the allegations of the amended complaint show a malicious abuse of process. The elements necessary for an action for malicious abuse of process are the existence of an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceeding. (Bonney v. King, 201 Ill. 47; Copley v. Bybee, 290 Ill. App. 117.) The allegations in

and accepted after a full hearing on the merits. In Shaw v. Shaw, 200 Ill. 2d 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

the amended complaint such as issuance of an execution after the term at which the judgment was entered had elapsed, the return thereof nulla bona, the subsequent garnishment proceedings, and other matters alleged, are not in our view such a perversion of process as to constitute an abuse of process. (Dixon v. Smith-Wallace Shoe Co., 283 Ill. 234.)

Every citizen has a right to come into a court of justice and claim what he deems to be his right without fear of being prosecuted for heavy damages. (Smith v. Michigan Buggy Co., 175 Ill. 619.)

We have considered the other points urged and the authorities cited in support thereof, but in the view we take of this case we deem it unnecessary to discuss them.

For the reasons assigned, the order sustaining defendants' motion to strike the amended complaint and dismissing the cause is affirmed.

ORDER AFFIRMED.

KILEY AND BURKE, JJ. CONCUR.

the attached complaint with an account of an examination after the  
 term at which the judgment was entered and of course, the reason  
 therefor. Julius Jones, the respondent, admitted responsibility and  
 other matters alleged, but not in his own name, a declaration of  
 process as to responsibility on behalf of himself. Julius Jones  
Julius Jones, 100 N. 1st St., St. Paul, Minn.

Many others had a right to take into account the  
 fact that this case is now in the hands of the court and  
 being presented for their consideration. Julius Jones,  
 100 N. 1st St., St. Paul, Minn.

We have reviewed the facts of this case and the  
 investigation of the court records, but in the case we have  
 this case we have a number of other facts.  
 The law is clear and the facts are clear, and the  
 action is taken for the right of the respondent and the  
 is allowed.

Very truly yours,

WILLIAM H. HARRIS, Jr., Attorney.

44091

ROBERT PILET and DAVID PILET,  
copartners, doing business as  
PILET SCRAP IRON & METAL CO.,

Appellants,

v.

CHICAGO & WEST TOWNS RAILWAYS, INC.,  
a corporation, SEMI-STEEL TEST  
FOUNDRY CO., a corporation, and  
ILLINOIS CENTRAL RAILROAD COMPANY,  
a corporation,

Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

335 I.A. 651

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

In an amended complaint filed in the Superior Court of Cook County, Robert Pilet and David Pilet, copartners doing business as Pilet Scrap Iron & Metal Company, alleged in Count I that they purchased from Chicago & West Towns Railways, Inc., a quantity of scrap rail, for which they paid, based upon certain weights; that this defendant delivered to them scrap rail weighing less than paid for; and that defendant is indebted to them for the difference; in Count II that they delivered to the Illinois Central Railroad Company certain scrap rail which had been loaded into two freight cars, with instructions to carry to the plant of the Semi-Steel Test Foundry Company; that the railroad company negligently failed to deliver all of the scrap rail so delivered to it, resulting in loss to plaintiffs; and in Count III that they delivered to Semi-Steel Test Foundry Company the quantity of scrap rail ordered by it. In each count plaintiff asked for judgment for \$3,684.92. Separate answers by each defendant joined issue. The Semi-Steel Test Foundry Company tendered to plaintiffs the amount called for by the quantity of scrap rail it admitted having received. A trial before the court without a jury resulted in findings and judgments in favor of each defendant and against plaintiffs, from which plaintiffs prosecute this appeal.





We will first consider plaintiffs' case against the Chicago & West Towns Railways, Inc. The first is the only count of the complaint asking relief against this defendant. Plaintiffs' evidence consisted of the testimony of one of them that he caused this scrap rail to be loaded upon cars obtained by this defendant from the railroad company; that the loading was under his supervision and direction; that the cars so loaded were full; that thereafter the cars were weighed by the Illinois Central Railroad Company, one of the defendants, which furnished the weights to this defendant; and that these were the weights upon which the plaintiffs paid for the scrap rail. Plaintiffs offered in evidence the receipted invoices of this defendant showing these weights; the bills of lading issued by the railroad company in which this defendant was named as consignor, but which were signed on behalf of this defendant by one of the plaintiffs; the receipted freight bills of the railroad company showing the weights of the two cars of scrap rail, which weights were the same as those shown on the invoices of this defendant; and invoice of plaintiffs to the Semi-Steel Test Foundry Company, to which they resold the scrap rail, which invoice was based on the weights set forth in this defendant's invoice. The foregoing was all of the evidence offered by plaintiffs on their case in chief. Plaintiffs then rested their case, whereupon this defendant moved for a finding in its favor. The court allowed the motion and found the issues in favor of this defendant and against plaintiffs. Thereafter this defendant did not participate in the trial.

At the close of plaintiffs' case there was no evidence to show that Chicago & West Towns Railways, Inc., delivered less than it had charged for. The exhibits offered by plaintiffs and received in evidence show that the weights for which plaintiffs were charged by this defendant were correct. When plaintiffs

... will first consider Plaintiff's case against the Chicago & West Town Railway, Inc. The first is the bill of lading of the coal which was being shipped to the defendant. Plaintiff's evidence consisted of the testimony of one of the men who was with this coal when it was loaded on the flatcars of this defendant from the railroad company; that the loading was under his supervision and direction; that the cars so loaded were full; that thereafter the cars were shipped by the Illinois Central Railroad Company, one of the defendants, under Plaintiff's bill of lading to this defendant; and that there were the weights upon these flatcars which were for the same rail. Plaintiff offered in evidence the received invoices of this defendant showing these weights; the bill of lading issued by the railroad company in which this defendant was named as consignee, and which was signed on behalf of this defendant by one of the plaintiffs; the received invoice of the railroad company showing the weights of the two cars of coal rail, which weights were the same as those shown on the invoice of this defendant; and invoice of Plaintiff to the West Steel Test Foundry Company, to which they shipped the same rail, which invoice was based on the weights set forth in this invoice. The foregoing was all of the evidence offered by Plaintiff on their case in chief. Plaintiff then rested their case. Thereupon this defendant moved for a finding in its favor. The court allowed the motion and found the issues in favor of the defendant and against Plaintiff. Thereafter was submitted and argued in the trial.

At the close of Plaintiff's case there was no evidence to show that Chicago & West Town Railway, Inc., defendant, had been so loaded for. The evidence offered by Plaintiff and received in evidence show that the weights for which Plaintiff were charged by this defendant were correct. When Plaintiff

rested their case the evidence proved that the scrap rail on the two cars weighed the quantity charged for by this defendant. At this stage of the case there was nothing in the record to show that this defendant failed to deliver the weights of scrap rail charged to plaintiffs and for which plaintiffs paid. Thus, there was a complete failure on the part of plaintiffs to prove the allegations of Count I of their complaint. No request was made by plaintiffs that the court withhold ruling on the motion of this defendant until all of the evidence had been received; nor was there a motion during or at the conclusion of the trial of the issues against the Semi-Steel Test Foundry Company to vacate the findings and to reopen the case against either of the other defendants for the purpose of introducing additional evidence. When the trial judge entered judgment on the finding in favor of the Chicago & West Towns Railways, Inc., it was only necessary for him to consider all of the evidence at the close of plaintiffs' case. The trial judge, in our opinion, properly entered judgment for the defendant, Chicago & West Towns Railways, Inc., and against plaintiffs.

Turning to a consideration of the case against the Illinois Central Railroad Company, we note that the issue between plaintiffs and this defendant, stated in Count II, was whether or not this defendant had breached its duty as a common carrier to safely carry and deliver two carloads of scrap rail, resulting in a shortage in each car when delivered to the consignee. At the close of plaintiffs' case the court sustained this defendant's motion for a finding in its favor. Thereafter this defendant did not participate in the trial. We agree with this defendant that plaintiffs failed to make out a prima facie case against it, and that their own evidence affirmatively proves transportation of the two cars to destination without loss. Plaintiffs have affirmatively proved that there was no loss of the contents of the cars while in transit. In their brief plaintiffs



stated their case the evidence proved that the above bill on the  
 two cars weighed the quantity ordered for by this defendant. At  
 this stage of the case there was nothing in the record to show that  
 this defendant failed to deliver the weight of some rail shipped  
 to plaintiff and for which plaintiff paid. Now, there was a  
 complete failure on the part of plaintiff to prove the allegations  
 of Count I of their complaint. No request was made by plaintiff  
 that the court withhold ruling on the action of this defendant  
 until all of the evidence had been received; nor was there a motion  
 during or at the conclusion of the trial for the judge to set  
 the trial aside for County Company to make the finding and to  
 reopen the case against either of the other defendants for the  
 purpose of introducing additional evidence. When the trial judge  
 entered judgment on the finding in favor of the plaintiff he was  
 wrong, in fact, it was only necessary for him to withhold it at  
 the evidence at the close of plaintiff's case. The trial judge,  
 in our opinion, properly entered judgment for the defendant, and  
 a new trial was granted, and plaintiff's case.  
 turning to a consideration of the case against the plaintiff  
 Central Railroad Company, we note that the issue between plaintiff  
 and this defendant, as set in Count II, was whether or not said  
 defendant had breached its duty as a common carrier to deliver  
 and deliver two carloads of some rail, weighing in a gross 10  
 each car when delivered to the consignee. At the close of plaintiff's  
 case the court sustained this defendant's motion for a finding in  
 its favor. Whether this defendant did not participate in the trial  
 we agree with this defendant that plaintiff failed to make out a  
 prima facie case against it, and that their own evidence affirmatively  
 proved transportation of the two cars to defendant's place. In  
 plaintiff's case affirmatively proved that there was no loss of the  
 contents of the cars while in transit. In their brief plaintiff



admit this, for they say: "When the two cars of scrap rail left the yards of Chicago & West Towns, they were full of scrap rails from side to side and end to end. The scrap was piled above the top level of the sides in the center of the two cars. When the two cars were delivered to defendant, Semi-Steel Test Foundry Company, they were still full, side to side and end to end. There was no indication that anything had been taken out of, or from the cars." In this state of the record the court was right in sustaining defendant's motion for a finding at the close of plaintiffs' case.

Plaintiffs are without any cause of action against the railroad company for the further reason that there was a lack of privity of contract. The bills of lading under which the cars moved were uniform straight bills of lading showing the Chicago & West Towns Railways, Inc., as the consignor and the Semi-Steel Test Foundry Company as the consignee. These bills of lading constitute the contract under which the rails were transported. The contract was between the Chicago & West Towns Railways, Inc. and the Illinois Central Railroad Company. Plaintiffs are not parties to this contract. In Aetna Insurance Co. v. Illinois Central R.R.Co. 365 Ill. 303, the court said (309):

"Thus, a carrier may be sued either in assumpsit or case; but there is no instance in which a party, who was not privy to the contract entered into with him, can maintain any such action."

See also National Iron & Steel Co. v. Hunt, 312 Ill. 245; Rudin v. King-Richardson Co., 311 Ill. 513; Kitza v. Oregon Short Line R.R.Co. 169 Ill. App. 609; American Fruit Growers v. San Antonio & Arkansas Pass Ry. Co., 239 Ill. App. 151; Wood & Co. v. Illinois Central R. R. Co., 240 Ill. App. 6.

The third count was directed against the Semi-Steel Test Foundry Company. The issue in the case against this corporation was as to how many pounds of scrap rail were received by it. The



count alleged delivery of 177,760 pounds in one car, whereas this defendant's answer stated only 104,440 pounds were received therein; and further alleged delivery of 173,520 pounds in another car, whereas the answer stated that only 72,100 pounds were received therein. The burden of proof rested on plaintiffs. At the close of plaintiffs' case the court denied this defendant's motion for a finding in its favor. Thereupon, this defendant introduced evidence to support its defense. This evidence sustained the averments of its answer as to the weight of the scrap rail actually delivered. The record supports the finding. There is no basis in the record for disturbing this finding.

In its defense the Semi-Steel Test Foundry Company introduced evidence that the two cars on which the scrap rail was loaded were not designed to carry the quantities which plaintiffs maintain were loaded on them, and that these cars did not have sufficient capacity to carry the quantity of scrap rail they insist was shipped. After the introduction of this testimony there was no motion by plaintiffs to vacate the findings theretofore made in favor of the other two defendants and to reopen the case against them for the purpose of introducing further testimony or of considering evidence introduced in the Semi-Steel Test Foundry Company case.

For the reasons stated the judgments of the Superior Court of Cook County are affirmed.

JUDGMENTS AFFIRMED.

LEWE, P.J. AND KILEY, J. CONCUR.





44153

KAREN B. KRAEGL,

Appellee,

v.

JOHN P. DAROS, EDWARD N. LANDRY  
and D. C. PENNOCK, doing  
business as ENTERPRISES EXCHANGE,

Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On December 18, 1946 Karen B. Kraegel filed her statement of claim in the Municipal Court of Chicago against John P. Daros, Edward N. Landry and D. C. Pennock, doing business as Enterprises Exchange, alleging that the defendants were brokers in the business of securing buyers or sellers for various enterprises; that on November 8, 1946 they represented to her that for \$900 they could and would procure for her a certain variety store located at 7622 West Belmont Avenue, Chicago, including stock, fixtures and good will and a lease for the premises thereon; that plaintiff and defendants entered into a written agreement; that she paid to the defendants \$900; that plaintiff was unable to consummate the purchase of the store and secure a lease of the premises; that as a result thereof the deal "was not expedited"; that the owner of the store "still has the same and is operating it"; that she demanded from the defendants the \$900 so paid; that the latter part of November, 1946 defendants paid her \$550 on account and promised to pay the remaining \$350 by December 12, 1946; and that defendants, despite demands for payment of the balance, refuse so to do. Plaintiff asks judgment for \$350. The return of the bailiff certifies that he served the writ of summons on John P. Daros and D. C. Pennock and that the other defendant, Edward N. Landry, could not be found.





John P. Daros filed a written "defence" consisting of six paragraphs, stating that Mrs. Lillian Paulick listed the store known as the Little Flower & Gift Shop, located at 7622 West Belmont Avenue, Chicago, for sale or exchange at \$800; that the Enterprises Exchange caused the business to be listed in their brokers' offices and advertised it in the daily newspapers at a price of \$1,200; that plaintiff, as a result of the advertising, called at their office; that she informed them that \$1,200 was more than she wished to invest; that defendant informed plaintiff that the business was listed at a net price of \$800 and offered to sell it to plaintiff for \$1,000, making a net brokerage profit of \$200; that plaintiff stated that her highest offer was \$900; that defendant then advised plaintiff that his firm would attempt to purchase the business from Mrs. Paulick for \$700, and if successful that plaintiff's offer of \$900 would be accepted; that thereupon defendant received from plaintiff the sum of \$900 as earnest money; that defendant succeeded in obtaining a reduction in the sale price from Mrs. Paulick, who agreed to sell her business, good will and leasehold for \$700 net; that defendant then deposited with Mrs. Paulick, in behalf of plaintiff, the sum of \$150 as earnest money and secured from Mrs. Paulick her bill of sale to plaintiff and vendor's sworn affidavit, which papers were delivered to plaintiff on November 13, 1946, together with a check of the Enterprises Exchange in the sum of \$350, made payable to Lillian Paulick; that plaintiff then and there left the office of defendant to meet with Mrs. Paulick and deliver the check to her and meet with her landlord to arrange possession of the business and premises; that shortly thereafter plaintiff advised defendant that she was unable to obtain possession of the premises, stating that the landlord refused to accept her as a tenant; that defendant talked to the landlord and found that

John F. Jones filed a written "Statement" summarizing the facts of the case, stating that Mrs. William Jones lived for many years at the Little River Hotel, located at 7000 West Avenue, Chicago, for sale or exchange of \$1000; that the mortgage was made by the bank to be listed in their records, Chicago, and recorded in the City of Chicago at a price of \$1,000; that plaintiff, as a result of the advertisement, called on Jones at his office; that she informed him that \$1,000 was more than she wished to invest; that defendant informed plaintiff that the business was listed at a net price of \$500 and offered to sell it to plaintiff for \$1,000, making a net profit of \$500; that plaintiff agreed that the business was not a business; that defendant then advised plaintiff that his firm would attempt to purchase the business from Mrs. Jones for \$700, and if successful that plaintiff's offer of \$500 would be accepted; that defendant obtained money from plaintiff for the sum of \$500 as earnest money; that defendant succeeded in obtaining a reduction in the sale price from \$700 to \$500; that defendant then deposited with Mrs. Jones, in the sum of \$500 as earnest money and received from Mrs. Jones her bill of sale to plaintiff and vendor's receipt; that plaintiff was delivered to plaintiff on November 11, 1920, together with a check of the Little River Hotel in the sum of \$500, made payable to William Jones; that plaintiff then and there left the office of defendant to meet with Mrs. Jones and deliver the check to her and deal with her business to complete possession of the business and premises; that plaintiff's representative advised defendant that she was unable to obtain possession of the premises, stating that the landlord refused to accept her as a tenant; that defendant asked to the landlord and found that

he was willing to have plaintiff as a tenant and to execute a lease to her; that in truth and in fact plaintiff was engaged in a divorce action, was in need of funds, had "suffered a change of mind" and wished to abandon her plan to purchase the gift shop business; that defendant, at the request of plaintiff, received permission from Mrs. Paulick to return to plaintiff the sum of \$550 out of the funds on deposit with defendant; that plaintiff agreed to an arrangement by which the seller, Mrs. Paulick, was to retain the \$150 earnest money deposited; that defendant was to be allowed to retain \$200 as a brokerage fee; and that defendant on November 23, 1946 paid over to plaintiff, through her attorney, a check of the Enterprises Exchange for \$550, plaintiff having surrendered to defendant the check in a like amount made payable to the order of Lillian Paulick. Defendant denied that he was indebted to the plaintiff in any sum whatsoever. On March 14, 1947 defendant, John P. Baros, filed a motion representing to the court that plaintiff had failed to file any reply to the new matter set forth in paragraphs 2 to 6, inclusive, of his "defence"; that by virtue of Sec. 40 of the Civil Practice Act and paragraph 2, Rule 26 of the Municipal Court Act, plaintiff, as a matter of law, admitted the truth of the matter so alleged; and the defendant moved the court to find that paragraphs 2 to 6 of the "defence" had been admitted as true by the plaintiff, "thus making it unnecessary for the said John P. Baros to incur expenditures in the preparation of evidence to prove the said allegations."

The case came on for trial on March 14, 1947, whereupon the court entered the following order:

"Now comes the plaintiff herein and moves the court that plaintiff be non-suited, wherefore it is ordered that this suit be and it hereby is dismissed out of this court. It is therefore considered by the court that the defendant have judgment herein as in case of non-suit and that the defendant have and recover of and from the plaintiff the costs by the defendant herein expended, and that execution issue therefor."







Defendant, John P. Daros, appeals. His theory is that the court, previous to the entry of the quoted order, sustained defendant's written motion for the entry of an order finding that the plaintiff had admitted, as a matter of law, all the new affirmative matters contained in paragraphs 2 to 6 of defendant's sworn "defence"; that the finding was the equivalent of evidence and that with the entry of the draft order containing the finding the defendant would have a sufficient record to enable him to maintain the issues of the cause; that because plaintiff made no attempt to comply with the provisions of the statute and rules pertaining to voluntary dismissal, defendant was deprived of substantial rights; and that the order allowing plaintiff to take a nonsuit or voluntary dismissal should have provided that said nonsuit was with prejudice against plaintiff filing a new suit against defendant on the same grounds of action. Plaintiff has not filed an appearance or briefs in this court.

The court certified to the following report of proceedings:

"Be it remembered that heretofore to-wit on the 14th day of March A. D. 1947, it being one of the days of said term of court, before the Honorable Harold P. O'Connell, one of the judges of said court, this cause came on for hearing on the trial call before the court without a jury. Plaintiff, Karen B. Kraegel, appeared in person; defendant, John P. Daros, did not appear in person, and the other named defendants did not appear, not having been served with process. Benjamin H. Ehrlich appeared for plaintiff, Karen B. Kraegel. Glynn J. Elliott of the law firm of Allen & Darlington appeared for defendant John P. Daros. Upon the call of the cause on the preliminary trial call, defendant's attorney moved for a short continuance, stating that defendant John P. Daros was in Boston, Massachusetts, and was expected back in Chicago within a few days. Plaintiff's attorney objected to any continuance, stating that defendant's attorney had notified him late in the afternoon of the day previous of defendant's absence, but that his client, the plaintiff, had come from out of the city and a continuance would result in inconvenience and expense to her. The court denied defendant's motion for a continuance. Defendant's attorney then presented defendant's motion in writing, enumerating the paragraphs in defendant's sworn affirmative defense setting forth new matters to which plaintiff had failed to plea or reply, and moving the court under Section 40 of the Civil Practice Act and Rule 26 (2) of the Municipal Court, to find that said matters contained in said



enumerated paragraphs of the Defense had been admitted as true by the plaintiff, thus making it unnecessary for the defendant John P. Daros to present evidence to prove said affirmative allegations. The court granted permission to file said motion and announced that the case was held for trial and that defendant's said motion would be passed upon when said cause was reached for trial in its turn. After some other causes before the court had been disposed of, this cause was called for trial. The court then entertained defendant's written motion in reference to the pleadings and said motion was argued at length by respective counsel for defendant and plaintiff and authorities were read and presented to the court. Plaintiff's attorney contended that defendant's sworn defense was simply a denial of the statements and allegations contained in plaintiff's statement of claim and did not present any new affirmative matters to which it was necessary for plaintiff to file a reply. Plaintiff's attorney read said statement of claim and set it off against defendant's sworn defense and a lengthy discussion ensued between the court and plaintiff's counsel during which the individual paragraphs of said pleadings were read and analyzed. The court announced his opinion that the several paragraphs of said defense enumerated in defendant's written motion did contain allegations of new affirmative matters of a material nature, which required a reply, and the court thereupon sustained defendant's written motion. Defendant's counsel then presented to the court for signature a draft order reading that 'the court finds that paragraphs 2, 3, 4, 5 and 6 of the Defense of John P. Daros have been admitted as true by the plaintiff.' Plaintiff's counsel announced that 'plaintiff takes a non-suit.' Defendant's counsel opposed plaintiff's motion for leave to take a non-suit and argued that said motion came too late and that plaintiff was not entitled to a non-suit without prejudice to file a new action based on the same claims put forth by her in this cause, and that moreover, plaintiff was not entitled to move for a voluntary dismissal of said cause, because of failure to comply with the conditions set up in the statutory provisions in reference to voluntary dismissals of actions at law. The court held that, as no testimony of witnesses had been taken and no evidence had been heard, that plaintiff's motion for voluntary dismissal was not too late and that the court would allow plaintiff to take a non-suit. Defendant's counsel then moved that the draft order sustaining defendant's motion in reference to the pleadings be signed by the court and spread of record, and that the record show that said order and finding had been made before plaintiff moved for non-suit. The court stated that since the plaintiff was being allowed to dispose of her case by taking a non-suit, that no other orders were necessary, and the court thereupon instructed the Clerk to enter the order showing 'Plaintiff takes non-suit. P.C.' Forasmuch as the matters and things hereinabove set forth do not fully appear of record, the defendant tenders this, his Report of Proceedings in said cause and prays the same may be signed and sealed by the Judge of said court, pursuant to the statute in such case made and provided, which is accordingly done this 6th day of May, A. D. 1947."

The case was set for trial. On the preliminary call the attorneys for the defendant, John P. Daros, endeavored to procure a short continuance on the ground that he (Daros) was in Boston



[illegible]

The above was the result. On the following day the  
statement for the defendant, John A. White, was received  
and that evidence on the record was in favor

and expected to return to Chicago in a few days. Plaintiff's attorney objected and the court denied the motion for a continuance. Defendant's attorney then urged the written motion theretofore filed and asked the court to find that the matters contained in paragraphs 2 to 6 of the "defence" be taken as true. The court announced that the case would be held for trial. After other cases were disposed of, the case was called for trial. Defendant's motion was then argued at length by the respective counsel, whereupon the trial judge stated that paragraphs 2 to 6 of the "defence" contained allegations of new affirmative matters and he sustained defendant's written motion. Defendant's counsel then presented to the court for signature a draft order reading: "The court finds that paragraphs 2, 3, 4, 5 and 6 of the Defense of John P. Daros have been admitted as true by the plaintiff." Plaintiff's counsel then announced that "Plaintiff takes a nonsuit." Defendant's counsel opposed plaintiff's motion for leave to take a nonsuit and argued that the motion came too late; and that she was not entitled to a nonsuit without prejudice. The trial judge then decided that as no testimony of witnesses had been heard that plaintiff's motion for a voluntary nonsuit was not too late and that he would allow it. Defendant's counsel then moved that a draft order sustaining his motion in reference to the pleadings be signed by the trial judge and spread of record. The trial judge stated that since the plaintiff was being allowed to dispose of her case by taking a nonsuit that no other orders were necessary.

[1] Par. 2 of Rule 26 of the Municipal Court of Chicago provides that when new matter by way of defense is pleaded in an answer, a reply shall be filed by the plaintiff, and that if no reply is filed the new matter set forth in the answer shall be deemed admitted.



and expected to return to Chicago in a few days. Defendant's attorney objected and the court denied the motion for a continuance. Defendant's attorney then urged the witness to testify and the court granted the motion. The court announced that the case would be held for trial. After that case was disposed of, the case was called for trial. Defendant's motion was then argued at length by the respective counsel, whereupon the trial judge stated that paragraphs 2 to 4 of the "Petition" contained allegations of new affirmative matters and he sustained defendant's written motion. Defendant's counsel then proceeded to the court for signature a draft order reading: "The court finds that paragraphs 2, 3, 4, 5 and 6 of the Petition of June 1, 1934 have been admitted as true by the plaintiff." Plaintiff's counsel then submitted that "I will call a witness." Defendant's counsel opposed plaintiff's motion for leave to take a witness and argued that the witness was too late; and that she was not qualified as a competent witness. The trial judge then decided that he was satisfied by the evidence and dismissed the plaintiff's motion for a witness. Plaintiff's counsel then argued that the witness was too late and that he would bring it. Defendant's counsel then moved that a draft order containing the action in reference to the findings be signed by the trial judge and moved to return. The trial judge stated that since the plaintiff was being allowed to proceed at his case by taking a witness that he should return were necessary.

Part 2 of Rule 26 of the Federal Rules of Evidence provides that when new matter by way of defense is pleaded in an answer, a reply shall be filed by the plaintiff, and that in no reply is filed the new matter set forth in the answer shall be deemed admitted.

Paragraphs 2 to 6 contained new matter and set up a defense to plaintiff's action. The court properly sustained defendant's motion to find that the truth of the ultimate facts set up in these paragraphs of the "defence" was admitted by plaintiff. The case was called for trial and plaintiff insisted on the case being tried. During the trial the court listened to the arguments of counsel on defendant's motion. After the court indicated that it would sustain defendant's motion, plaintiff did not offer or seek leave to file a reply to the "defence". Apparently, plaintiff was satisfied that she could not, with propriety, file a reply controverting the affirmative "defence" so stated. The truth of the "defence" being admitted, defendant was entitled to judgment.

Under the circumstances presented by the record plaintiff was not entitled to a dismissal without prejudice. Therefore, the judgment of the Municipal Court of Chicago, entered March 14, 1947, is reversed and the cause is remanded with directions to sustain defendant's motion that the truth of the matters alleged in the "defence" is admitted, and to enter a judgment for defendant John P. Daros and against plaintiff.

JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

LEWE, P.J. AND KILEY, J. CONCUR.



44129

HATTIE RICE,

Appellant,

v.

JOSEPH A. GALKOWSKI,

Appellee.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

3381.A. 352

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is a replevin action to recover a 1940 Buick automobile. The automobile was seized under the writ issued and given to plaintiff. Trial was by the court without a jury and right of possession was found to be in defendant Galkowski. Judgment was entered accordingly and plaintiff has appealed.

Defendant denied plaintiff's allegations of right of possession and of his unlawful detention. He averred ownership through a good faith purchase from Milton Neale "who had title to the property."

At the time of the trial plaintiff a "beauty culturist," was owner of a 1940 Buick which she had purchased in 1944 for \$1,034.25. After the purchase was made a certificate of title issued to her out of the Office of the Secretary of State. In December 1945 she met William Jones. The payments on the car were then completed. She and Jones thereafter became engaged to be married. In February 1946 she turned over to him the Buick and her certificate of title thereto. About March 1st, 1946, he sold the Buick to Neale for \$500. Jones gave Neale a bill of sale and the certificate of title. Neale refused to take the certificate unless the assignment on the reverse side thereof was executed by plaintiff, whom he knew was the owner. Jones took the certificate away and when it was returned to Neale the assignment bore what purported to be Hattie Rice's signature. The signature was not acknowledged by a notary.





Neale did not have his name written into the assignment as assignee. When defendant agreed to buy the Buick, he and Neale took the certificate to a notary public for acknowledgment of the signature of Hattie Rice. The notary telephoned plaintiff and, thereafter, acknowledged the signature. Defendants name was inserted as assignee.

Plaintiff says that she received none of the money which Neale paid Jones; that Jones was not supposed to sell the Buick, but was to have it appraised for purposes of getting a new car; that she did not know that the car was being offered for sale, having been told by Jones it was at a dealer's and that if a new car was found she would be called over to "close the deal"; that she gave him the certificate of title so he could show the car was not stolen; and that she broke her engagement after the Buick was sold, but continued to go with Jones until September on advice of her lawyer so that Jones could be apprehended.

The record shows no demand by plaintiff for the return of the car before this suit was instituted October 11, 1946, though it does show that Galkowski was summoned to the States Attorney's office in September 1945 in connection with the arrest of Jones. We infer from the record that Hattie Rice had Jones arrested in September 1946 for forgery of the assignment of title.

The only material substantial dispute in the testimony is upon the conversations between plaintiff, defendant and the notary. The notary testified that plaintiff told him it was "all right" to acknowledge the signature because she knew about the sale and that she asked him to have defendant call her. The latter says he called her and she asked him only what he paid for the Buick. Plaintiff gives a different version.

With respect to the first dispute we cannot say that the trial judge, who saw and heard the witnesses, should have

Heale did not have his name written into the assignment as assignee. When defendant agreed to buy the truck, he and Heale took the certificate to a notary public for acknowledgment of the signature of Heale alone. The notary signed the certificate and, thereafter, acknowledged the signature. Defendant then was inserted as assignee.

Plaintiff says that the received name of the money which Heale paid Jones; that Jones was not supposed to sell the truck; but was to have it purchased for purposes of selling it new car; that she did not know that the car was being offered for sale, having been told by Jones it was at a dealer's and that it was a new car was found and would be called over to "show the car"; that she gave him the certificate of title as he asked; that the car was not taken; and that she broke her promise; after the truck was sold, but continued to go with Jones until defendant no longer of her lawyer as that Jones could be recommended.

The record shows no demand by plaintiff for the return of the car before this suit was instituted October 11, 1945, though it does show that defendant was summoned to the state attorney's office in September 1945 in connection with the arrest of Jones. We infer from the record that Heale also was Jones arrested in September 1945 for forgery on the assignment of title. The only material impeaching evidence in the testimony is upon the conversation between plaintiff, defendant and the notary. The notary testified that plaintiff told him it was "all right" to acknowledge the signature because she knew about the sale and that she asked him to have defendant sell her. The latter says he called her and she asked him only what he paid for the truck. Plaintiff gives a different version.

With respect to the first dispute we cannot say that the trial judge, who saw and heard the witnesses, should have

accepted plaintiff's version instead of defendant's and the notary's. Though it is strange that she should want to know what defendant paid, unless on the assumption that he was buying from Jones. It would be fair for the court to infer that the notary would not have made the acknowledgment nor defendant the purchase, had plaintiff told them that the signature was not hers and neither it nor the sale authorized. The court was free to make reasonable inferences from the uncontradicted testimony of plaintiff concerning the reason why she delivered the car over to Jones.

The question before us is whether, based on the various inferences, the trial court made a correct decision.

[2-4] The owner of goods may by his conduct be estopped from denying a seller's authority to sell. Sherer-Gillett Co. v. Long, 318 Ill. 432; Drain v. LaGrange State Bank, 303 Ill. 330; Fawcett v. Osborn, 32 Ill. 411; Lambert v. Dabbs, 302 Ill. App. 400.

Plaintiff argues that even if defendant's version of the telephone conversation is true, there is no estoppel in this case. Mere possession by Jones was not of itself sufficient indicia of ownership. Fawcett v. Osborn; Finance Corp. v. Miarick, 319 Ill. App. 98. In addition to possession of the Buick, however, plaintiff gave Jones the certificate of title. She thus enabled him to offer the car for sale for a period of about two weeks and to use the certificate of title in selling the car to Galkowski's vendor.

[5] It is true that the one invoking the estoppel rule must not have acted imprudently. Fawcett v. Osborn, 32 Ill. 411. Defendant says he relied upon Neale's possession and the assignment bearing plaintiff's signature. Probably it was he who insisted that the assignment be validated by the notary's acknowledgment. This acknowledgment was made after the notary talked to plaintiff. Defendant then talked to her and she, according to

accepted plaintiff's version instead of defendant's, and the court's decision, though it is apparent that the court had to know what defendant said, unless on the assumption that it was correct, the court would be left for the court to infer that the court would not have made the acknowledgment not defendant the defendant, but plaintiff, still told them that the signature was not made and without it was the authentic. The court was free to make reasonable inferences from the acknowledged plaintiff's affidavit concerning the position why she delivered the car over to Jones.

The question before us is whether, based on the evidence introduced, the trial court made a sound decision. [7-1] The court of appeals may or may not be required to follow the ruling of the trial court's authority to rule. People v. Jones, 210 Ill. App. 2d 111, 112; People v. Jones, 210 Ill. App. 2d 111, 112; People v. Jones, 210 Ill. App. 2d 111, 112; People v. Jones, 210 Ill. App. 2d 111, 112.

Plaintiff argues that even if defendant's version of the conversation is true, there is no proof in this case that possession of these was not of itself sufficient evidence of ownership. People v. Jones, 210 Ill. App. 2d 111, 112; People v. Jones, 210 Ill. App. 2d 111, 112; People v. Jones, 210 Ill. App. 2d 111, 112; People v. Jones, 210 Ill. App. 2d 111, 112. In addition to possession of the car, however, plaintiff gave Jones the certificate of title. The court stated that it was not out for sale for a period of about two weeks and to have the certificate of title in selling the car is defendant's version.

[7-2] It is true that the one involving the second car was not have noted independently. People v. Jones, 210 Ill. App. 2d 111, 112; People v. Jones, 210 Ill. App. 2d 111, 112; People v. Jones, 210 Ill. App. 2d 111, 112; People v. Jones, 210 Ill. App. 2d 111, 112. Plaintiff's signature. Obviously it was the fact that the assignment was validated by the court's acknowledgment. This acknowledgment was made after the court failed to find that defendant then failed to find and was, according to



him, did not disavow the sale. The court must have concluded that defendant was reasonably prudent in the transaction. We are not here concerned with the relationship between Neale and Jones. It is true that Neale did not send the assigned certificate to the Secretary of State and apply for a new one. Defendant knew this and saw that Neale's name did not appear as assignee. Defendant argues this was a mere short cut custom ordinarily indulged in like transactions.

Plaintiff argues that defendant should have noticed the dissimilarity in the signatures on the face and back of the certificate. This may have been why he wanted the acknowledgment and the notary wanted confirmation of the transaction. Neale bought from Jones at a figure beneath the O.P.A. ceiling. Defendant, however, paid the ceiling price and whatever inference may be made as to Neale's notice is not valid against defendant.

[6] Plaintiff repeatedly argues that Neale did not rely upon Jones as owner. We do not see how this helps plaintiff against defendant. Moreover, if Neale relied upon Jones' agency for plaintiff and she confirmed a sale by him, defendant's position is stronger. If plaintiff placed in Jones' hand the apparent power of disposition of the Buick, she must bear the loss from a sale to an eventual reasonably prudent purchaser. We need not find that defendant was innocent of all imprudence in the transaction. We think that the court was justified on this record in finding that he was reasonably prudent and that, as between him and plaintiff, she cannot assert her ownership.

For the reasons given the judgment is affirmed.

JUDGMENT AFFIRMED.

LEWE, P.J. AND BURKE, J. CONCUR.





44156

MARION G. KUNSTMANN,

Plaintiff - Appellee,

v.

ROLAND M. KUNSTMANN,

Defendant - Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY.

3331A.653

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action for divorce on the ground of cruelty. A decree was entered in plaintiff's favor February 21, 1947. Defendant duly appealed from the decree. Thereafter an order was entered allowing plaintiff attorney's fees to defend the decree on appeal. Defendant has also appealed from that order.

The parties were married June 20, 1942. One child was born of the marriage. They lived with defendant's parents until late August or early September 1945. During that period defendant worked as a railroad crossing flagman. His hours were from 7 A. M. until 3 P. M. He earned about \$160 a month. Plaintiff worked during most of the period.

Plaintiff first left defendant in April 1945. She returned late in June or early in July. She left for a couple of weeks August 16th. When she returned they moved into their own home in Yorkville near Elmhurst, Illinois. Plaintiff's parents lived two doors away. Her mother visited them "practically every day." The final separation of the parties was in December 1945. Plaintiff sued for divorce December 26, 1945.

The complaint alleged plaintiff's good conduct as a wife and extreme and repeated cruelty by defendant. Defendant answered denying these charges and alleged adultery on the part of plaintiff and her desertion. Plaintiff replied denying adultery

DORIS E. KUNSTMAN,  
 Plaintiff - Appellee,  
 v.  
 DORIS E. KUNSTMAN,  
 Defendant - Appellant.

88-1-238

This is an action for divorce on the ground of cruelty. A decree was entered in Plaintiff's favor February 21, 1944. Defendant duly appeared from the decree. The matter was entered allowing Plaintiff's attorney's fees to stand and decree on appeal. Defendant has also appeared from that appeal. The parties were married June 20, 1937. One child was born of the marriage. They lived with defendant's parents until late August or early September 1942. During that period defendant worked as a waitress and cleaning woman. His hours were from 5 p. m. until 3 a. m. He earned about \$120 a month. Plaintiff worked during most of the period. Plaintiff first left defendant in April 1943. She returned late in June or early in July. She left for a period of weeks August 1943. When she returned they moved into their own home in Yorkville near Alhambra, Illinois. Plaintiff's parents lived two doors away. Her mother visited them occasionally every day. The final separation of the parties was in December 1943. Plaintiff sued for divorce December 22, 1943. The complaint alleged Plaintiff's good husband was a wife and extreme and repeated cruelty by defendant. Defendant answered denying those charges and alleged adultery on the part of Plaintiff and her cohabitation. Plaintiff replied denying adultery

and in the alternative alleged condonation. Defendant rejoined denying condonation and alleged plaintiff's continuous misconduct until their separation.

Defendant contends that the decretal findings of plaintiff's good conduct and defendant's cruelty and against the affirmative defense of adultery are contrary to the manifest weight of the evidence; that if there was condonation it was repudiated by her subsequent conduct; and that the allowances of alimony, medical expenses and attorney's fees were not justified.

In support of the complaint, plaintiff testified that the first Sunday in May 1945 defendant struck her and wrenched her shoulder; that October 20, 1945 he slapped her face causing it to swell; and that December 8, 1945, he shoved and struck her. She says she left him in April when he insulted her and she slapped his face. The alleged cruelty in May she said took place at her mother-in-law's when she returned to remove some personal papers, about which a dispute arose. Her mother testified that plaintiff returned crying and had a dislocated shoulder and said that defendant had hurt her. A doctor testified that in the latter part of May 1945 he treated plaintiff for bruises and swelling of the shoulder and that plaintiff told him that her husband struck her. Plaintiff's father said that she was at his home in May and recalled the doctor being there.

Plaintiff testified that October 20, 1945 in a dispute over defendant's failure to take her out, she accused him of being insanely jealous and he struck her with the back of his hand. Her mother and father said they saw her after the quarrel;<sup>and</sup> that she was crying and her face was swollen. The mother said the next day plaintiff told her defendant had struck her. About December 1, 1945, plaintiff became ill and her father came, wrapped her in blankets and brought her to his home for a week. Plaintiff says

and in the alternative a/like consequences. Defendant retained  
anyway consultation and alleged Plaintiff's activities also  
until their separation.

Defendant contended that the detailed findings of Plaintiff's  
attorney's good conduct and Defendant's attorney's conduct were  
affirmative evidence of Plaintiff's conduct in the matter  
weight of the evidence; that it there was confusion in the  
regulation by her subsequent conduct; and that the Plaintiff's  
attorney, medical expenses and witness; they were not justified.  
In support of the contention, Plaintiff testified that

the first Sunday in May 1966 defendant visited her and remained for  
approximately May 1966; that he stayed for two weeks in the  
apartment; and that Defendant, in 1966, he stayed for about two  
days and left her in April when he returned for the first time  
the last. The alleged conduct in May was also about 1966  
her mother-in-law's when she returned to her home after several  
months, about which a witness testified. The witness testified that  
plaintiff returned crying and had a distressed expression on her  
face that defendant had just left. A witness testified that in May  
later part of May 1966 he stayed overnight for business and  
wellness of her children and that plaintiff told him that her  
husband visited her. Plaintiff's father said that she was in a  
state in May and recalled the following facts.

Plaintiff testified that on May 1966, in a telephone  
conversation, Plaintiff's father told her that, she returned him at home  
in May 1966 and he stayed with her for the rest of his life. She  
and mother and father said that they saw her the following day and  
she crying and her face was swollen. The mother said that the last day  
Plaintiff told her defendant had stayed her. About December 1,  
1966, Plaintiff became ill and her father came, remained for a  
few days and brought her to his home for a week. Plaintiff was



that the night she returned and, while still ill, defendant struck her because she refused to submit to intercourse.

The testimony of Dr. Gutzmer and plaintiff's parents as to her facial appearance in May and October was admissible.

Berdell v. Berdell, 80 Ill. 604. There was no showing, however, that plaintiff's statements, as to the causes of her physical appearance, were spontaneous and, consequently, they were not admissible. Ryan v. Ryan, 321 Ill. App. 467.

Defendant had the burden of proving the affirmative defense of adultery. The chancellor found that the defense was without merit under the evidence. Defendant denied mistreating plaintiff on any of the occasions referred to. He said he did not remember plaintiff's parents being at the Kunstmann home October 20, 1945. Defendant says that they got along well until the end of March 1945, and that their trouble began, when George Strelka returned from an Army camp on furlough. He attributed all the marital difficulties to plaintiff's affair with George Strelka with whom he charged she committed adultery.

Strelka was a soldier and during the period of time involved in this case was located at a camp near Pratt, Kansas. He had visited the parties during their marriage. Defendant testified that his wife went out with George on March 28 and 29, when the latter was on furlough; that thereafter she told him she loved George and wanted a divorce and, that to prove her love, she showed him letters written to George during March. He said that the disputes about George kept up during the next several months; that June 25 his wife left home and remained away until July 4; that she told him she had been out with George and asked him what he would do if she had a baby by George; and that he continued to live with her thereafter on her promise that she would be good.

that the night she returned and, while still ill, defendant struck her because she refused to submit to intercourse.

The testimony of Dr. Gutter and Plaintiff's mother as to her social appearance in May and October was conflicting.

Ward v. Ward, 221 Ill. App. 437. There was no showing, however, that Plaintiff's statements, as to the manner of her physical appearance, were spontaneous and, consequently, they were not admissible. Ward v. Ward, 221 Ill. App. 437.

Defendant had the burden of proving the affirmative defense of insanity. The chancellor found that the defense was not established under the evidence. Defendant would introduce Plaintiff on any of the occasions referred to. He said he did not remember Plaintiff's parents being at the farmhouse near October 22, 1922. Defendant says that they may have been there but he does not know, and that their chronic illness, when George's illness started from an Army camp in Kentucky. He attributed all the mental difficulties to Plaintiff's illness with George's illness with whom she charged she committed adultery.

George was a soldier and during the period of time involved in this case was located at Camp near Fort, Kansas. He had visited the parties during their marriage. Defendant testified that his wife went out with George on March 25 and 26, 1922. The latter was on furlough; that thereafter she said his son loved George and wanted a divorce and, that to prove her love, she showed him letters written to George during March. He said that she discussed about George kept up during the next several months; that June 25 his wife left home and remained away until July 4; that she told him she had been out with George and asked him what he would do if she had a baby by George; and that he continued to live with her thereafter on her promise that she would be good.

Plaintiff was working at the Jefferson Electric Company and on V-J day, August 15, 1945, had received her pay check. She left home for about two weeks. Defendant says she told him she was going on a vacation before taking up housekeeping in their own home. Plaintiff says she left after a disagreement with defendant about not going out. After leaving a note for him which expressed devotion, she took a train to Kenosha where she wired him not to worry, and again expressed love. After sending the wire, she returned to Chicago and took a train for Pratt, Kansas. She lived there in the hotel in a room, under registration by Strelka as "Mr. and Mrs. George Strelka." Plaintiff's mother reported plaintiff's absence during this period to the police. Strelka denied that he and plaintiff had had sexual intercourse. Plaintiff and he say that, outside of an hour's visit in the lobby when she arrived, he did not see her in the hotel. He says he saw her daily for about an hour at the railroad station, trying to arrange her transportation. Plaintiff says she sent the wire to defendant from Kenosha because she feared him; that while in Kansas she did not try to communicate in any way with defendant to see how her son was; and that she spent one evening there caring for the baby of a soldier's wife "because I missed my little guy something terrible."

Defendant says that plaintiff admitted adultery with Strelka. She denies this, saying she admitted visiting him but that Strelka acted as a gentleman and she was not ashamed. Defendant incurred plaintiff's wrath by telling her Strelka did not love her and only "wanted" her for a woman and "for one purpose." There are several highly amorous letters in evidence. There is dispute about the authorship and genuineness. They purport to be between plaintiff and Strelka, written after his furlough visit to Chicago in late March 1945. Defendant suggests that all but one of the writings are copies of letters which plaintiff sent to Strelka. Plaintiff

plaintiff was working at the University of Chicago in 1945 and on 7-5 day, August 11, 1945, had received her pay check. She left home for about two weeks. Defendant told her that she was going on a vacation before taking up housekeeping in this home. Plaintiff says she left after a disagreement with defendant about not going away. After leaving a note for the child, defendant, she took a train to Kansas where she lived for two or three weeks, and again returned home. After visiting the child, she returned to Chicago and took a train for West, Kansas. She lived there in the hotel in a room, where registration by check was made. Plaintiff's mother visited her in the hotel. Plaintiff's absence during this period to the police. Plaintiff and defendant were outside at an early visit in the room when she arrived. He did not see her in the hotel. He says he saw her only for about an hour at the railroad station, again in Kansas but defendant's. Plaintiff says she was the wife of defendant. She knows defendant was turned him; that while in Kansas she did not try to communicate in any way with defendant or see how her son was; and that she could not avoid their seeing for the body of a child's wife because I raised my little boy something terrible."

Defendant says that Plaintiff wanted custody with her. The child was, saying she wanted custody and that she was not a woman and she was not a woman. Defendant's mother said that Plaintiff's mother did not love her and only "wanted" her for a woman and "for the money." There are several highly accurate facts in evidence. There is disagreement about the authorship and genuineness. They cannot be ascertained by Plaintiff and herself, written after the return visit to Chicago in late March 1945. Defendant suggests that all but one of the letters are copies of letters which Plaintiff sent to herself. Plaintiff



says the letters are not genuine and suggests trickery by defendant. We think there is little room for doubt that Strelka wrote the letter introduced bearing his signature. He both admitted and denied writing it to plaintiff. It was written in care of her mother's home. Plaintiff's previous attorney said that in her presence his partner told him that she had "broken down and admitted that it is her signature" on one of the letters of March 30. She denied they were in her handwriting. Strelka said he knew her handwriting because he had received letters written by her. When shown these writings he said he could not tell whether they were in her handwriting. In view of the testimony about the relationship between plaintiff and Strelka at the time, we need go no further than to say that it is reasonable to conclude the letters are copies, or originals of letters actually sent to Strelka.

Plaintiff and Strelka testified in pre-trial depositions that she did not visit him at Pratt, Kansas. She testified then that she spent the time in hiding at her sister's. At the trial both readily admitted that they had testified falsely under the depositions. They said their then attorney advised them to testify falsely because no one would believe the truth about her visit to Pratt, Kansas. The attorney denied giving the advice.

In addition to the foregoing testimony defendant's family doctor, who delivered both defendant and the son of the parties, testified that plaintiff in April 1945 said she did not love defendant any longer and wanted to divorce him. Plaintiff denied making the statement. Her father testified that plaintiff was a model wife and defendant a model husband.

Defendant admitted living with plaintiff as her husband after seeing letters from Strelka to plaintiff and after she, according to him, admitted her sexual relations with Strelka. He testified that in February 1946, after their final separation,



says the letters are not genuine and suggests inquiry by defendant. He thinks there is little hope for about that. Plaintiff wrote the letter introduced during his signature. He kept admitted and denied writing it to plaintiff. It was written in name of her mother's home. Plaintiff's previous attorney said that in her presence his partner told him that she had known even and admitted that it is her signature" on one of the letters of March 30, 1948. Plaintiff said she knew her denied they were in her handwriting. Plaintiff said she knew her handwriting because he had received letters written by her. When shown three witnesses he said he could not tell whether they were in her handwriting. In view of the testimony about the relations and between plaintiff and defendant at the time, we need go no further than to say that it is reasonable to conclude the letters are copies, or originals of letters actually sent to plaintiff. Plaintiff and Charles testified in pre-trial negotiations that she did not visit him at Pratt, Kansas. She testified that that she spent the time in living at her father's. At the trial both readily admitted that they had testified falsely under the oaths. They said their own attorney advised them to testify falsely because no one would believe the truth about our state to Pratt, Kansas. The attorney wanted giving the advice. In addition to the foregoing testimony defendant's family doctor, who delivered both defendant and the son of the plaintiff, testified that plaintiff in April 1948 said she did not love defendant any longer and wanted to divorce him. Plaintiff's mother, the statement. Her father testified that plaintiff was a model wife and defendant a model husband. Defendant admitted living with plaintiff as her husband after seeing letters from plaintiff to defendant and after she, according to him, admitted her sexual relations with plaintiff. He testified that in February 1948, after their final separation,

he saw Strelka leaving plaintiff's home, via the back door, after midnight. On motion of plaintiff's counsel this testimony was stricken, the grounds being that there were no "dates or anything else regarding the charges." This was error. The matter was in the answer, but if it had not been, the court should have denied the motion. Ollman v. Ollman, 395 Ill. 176. Plaintiff's mother, however, later denied this testimony by defendant.

The court found that plaintiff had proved her charges and that the defenses asserted were without merit. Implicit in these are that plaintiff proved extreme and repeated cruelty; that the defense of recrimination through adultery asserted by defendant was without merit; that defendant condoned plaintiff's adultery, if there was adultery; and that plaintiff's subsequent conduct did not revoke the condonation. The parties agree that the Divorce Act should receive a strict rather than liberal construction; that the ground for a divorce must be fully proven by reliable witnesses; and that the chancellor's findings should not be disturbed unless against the manifest weight of the evidence.

Assuming that plaintiff had proven the acts of cruelty in May and October, satisfactorily, she continued thereafter to live with defendant until she left him December 9th, according to her, or December 17th according to him. Assuming she had been guilty of adultery with Strelka in Kansas during August, defendant admits that with this knowledge he continued to live with her until their separation. Thus, each condoned the other's misconduct, subject to future good conduct. Her case then rests upon her proof that in December, after she returned from her parent's home, he struck her when she refused to submit to him because of illness. Proof of this would revive the previous acts as grounds for divorce.

he saw Strickland leaving Plaintiff's home, via the back door, after midnight. On motion of Plaintiff's counsel this testimony was admitted, the grounds being that there were no "color or taint" also regarding the character. This was error. The latter was in the answer, but it is not in the court record. The latter was in the motion. Gilman v. Gilman, 388 Ill. 176. Plaintiff's witness, however, later denied this testimony by testimony.

The court found that Plaintiff had proved her charges and that the defenses asserted were without merit. Plaintiff in these are that Plaintiff proved extreme and repeated cruelty; that the defense of recrimination through adultery asserted by defendant was without merit; that defendant admitted Plaintiff's adultery, if there was adultery; and that Plaintiff's subsequent conduct did not reveal the consideration. The court also found that the divorce Act should receive a strict rather than liberal construction; that the ground for a divorce must be fully proved by reliable witnesses; and that the chancellor's findings should not be disturbed unless against the manifest weight of the evidence.

Assuming that Plaintiff had proven the acts of cruelty in May and October, respectively, the continued separation to live with defendant until she left his house in December 1934, according to her, or December 15th according to him, assuming she had been guilty of adultery with Strickland in January during which, defendant admits that with this knowledge he continued to live with her until their separation. Then, such conduct is other's misconduct, subject to future good conduct. Her case then rests upon her proof that in December, after the removal from her parent's home, he struck her when she refused to submit to him because of illness. Proof of this would revive the previous acts as grounds for divorce.

Defendant admits that the night in question they slept apart. This was not because of any dispute, he insists, but because she was ill.

There is no corroboration of this charge of cruelty. We recognize the difficulty of supporting charges of this kind. Nevertheless on the record before us we hold that the finding that plaintiff has met her burden of proving this charge is against the manifest weight of the evidence.

In view of our conclusion we shall not pass upon the contentions of defendant with respect to the allowance of alimony, medical expenses and attorney's fees in the trial court. The court allowed plaintiff \$250 to defend her decree on this appeal. Defendant does not claim the allowance is excessive. He argues that there was no hearing upon which to base the allowance and that plaintiff should pay her attorneys.

The allowance is permissible under Section 15 of the Divorce Act, Chap. 40, Par. 15, Ill. Rev. Stats. Garrett v. Garrett, 341 Ill. 232; 173 N. E. 107. We think that the testimony heard in February 1947 was sufficient basis for the allowance, if proper, early in March. Defendant refers us to the \$500 paid by plaintiff to her first attorney in the case, and the moneys expended for her trip to Kansas, showing her financial ability. These may have depleted her funds so as to make the allowance necessary. He refers us to her work record and says there is nothing to show she is not now able to work.

Plaintiff testified she had no income; that she was living with her parents and not paying for room or board; and that she had worked for 9 months of 1946 at Western Electric Co., taking home an average of \$31 per week. Defendant testified he earned about \$160 monthly, and about \$75 a year from music; and has assets of two \$25 war bonds. He paid \$10 a week to his parents for board and room. We see no reason to disturb the allowance.



...that the claim is questionable. ...  
...not because of any ...  
...There is no ...  
...recognize the ...  
...Nevertheless on the ...  
...plaintiff has not ...  
...least weight of the evidence.

In view of ...  
...of defendant with respect to the ...  
...actual expenses and attorney's fees in the ...  
...court allowed plaintiff \$250 for ...  
...defendant does not ...  
...that there was no ...  
...plaintiff should pay her attorney.

The allowance is ...  
...Chas. J. ...  
...1931 ...  
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...plaintiff testified ...  
...living with her ...  
...had worked for ...  
...some an average of ...  
...about 150 ...  
...two ...  
...no person is ...



For the reasons given the divorce decree is reversed and the cause is remanded for further proceedings, and the order allowing plaintiff's attorneys fees to defend the decree on this appeal is affirmed.

THE ORDER FOR ATTORNEY'S FEES IS AFFIRMED,  
THE DECREE FOR DIVORCE IS REVERSED AND THE  
CAUSE REMANDED.

LEWE, P.J. AND BURKE, J. CONCUR.

For the reasons given the above order is reversed and the case is remanded for further proceedings, and the order allowing plaintiff's attorney fees is set aside the same as this appeal is affirmed.

THE ORDER FOR ATTORNEY'S FEES IS AFFIRMED.  
THE ORDER FOR COSTS IS REVERSED AND SET ASIDE.  
JAMES H. HARRIS, JR.

WITNESSED my hand and seal of office at the City of New York, this 1st day of March, 1934.

44192

WESTERN CONTRACTORS SUPPLY COMPANY,

Plaintiff,

v.

T. P. DOWDLE COMPANY, a corporation,

Defendant - Appellee,

STONE & WEBSTER ENGINEERING COMPANY,

Third Party - Appellant.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

38-1-A-653<sup>283</sup>

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action, on an account stated, for the balance due of \$415.11 upon the sale of engineering equipment. The defendant Dowdle Company brought the Engineering Company into the case through a Third Party claim under Rule 25 of the Municipal Court. The issues made on the Third Party claim were tried by the court without a jury and resulted in a finding and judgment for Dowdle Company for \$5,200. The Engineering Company has appealed.

The Engineering Company was the prime contractor for the Kankakee Ordnance Works, a United States Government war project, from September 12, 1940 to July 15, 1944. Dowdle Company was a subcontractor for the sewage and drain work. In its Third Party claim, the Dowdle Company alleged that the Engineering Company borrowed and used two of Dowdle Company's pneumatic pumps and hose connections, etc.; that the Engineering Company agreed to pay a reasonable charge for the use; that a reasonable rental was \$104.67 per month; and that there was due the Dowdle Company for the rental of the pumps \$5,358.17. In the Dowdle Company's original Third Party claim, it alleged that the Engineering Company "possessed itself of the pumps and appropriated the same to its own use." The pumps, subject of the claim, are described as: "1 AD 3 Diaphragm Nova Pump \* \* \* Serial No. A, 61950 \* \* \* 1 - 2" Homelite Pump, Serial No. 22154."

WESTERN DISTRIBUTION, BUT THE COMPANY,

PLAINTIFF,

v.

F. F. BOWLE COMPANY, a corporation,

Defendant - Appellee,

BYRON A. BOWLE ENGINEERING COMPANY,

Third Party - Appellant.

THE JUDICIAL CLERK CERTIFIES THE VERDICT OF THE COURT.

This is an action, on an account stated, for the balance

due of \$115.11 upon the sale of engineering equipment. The

defendant Bowle Company brought the Engineering Company into the

case through a third party claim under Rule 25 of the Federal

Court. The issues made on the third party claim were ruled by

the court without a jury and resulted in a finding and judgment

for Bowle Company for \$1,504.77. The Engineering Company has appealed.

The Engineering Company was the prime contractor for

the Kansas Ordnance Works, a United States Government war plant,

from September 12, 1940 to July 12, 1944. Bowle Company was a

subcontractor for the same and claim work. In the third party

claim, the Bowle Company alleged that the Engineering Company

borrowed and used two of Bowle Company's portable pumps and hose

connections, etc.; that the Engineering Company agreed to pay a

reasonable charge for the use; that a reasonable rental was \$104.77

per month; and that there was due the Bowle Company for the

rental of the pumps \$1,528.17. In the Bowle Company's original

third party claim, it alleged that the Engineering Company

"possessed itself of the pumps and appropriated the same to its own

use." The pumps, subject of the claim, are described as: "1 1/2

3 Discharge Hand Pump " " Serial No. 1, 11500 - " " 1 - 2" diameter

Pump, Serial No. 22184."

The Engineering Company answered through the United States District Attorney that it did not borrow or use the pumps and that it was not liable for any rent on account thereof. It averred that Dowdle Company under its subcontract was required to submit its claim to an arbitrator and that it had not done so. In answer to interrogatories filed by Dowdle Company, the Engineering Company stated that it operated 25 to 45 pumps on the project; that when it vacated the premises it turned over to the United States engineers all of the equipment used by it; that the equipment was not inventoried; and that it did not have possession of, nor relinquish to the Engineers, the Dowdle Company pumps.

It was stipulated that the amount of the judgment was computed upon the 50 month interval between Dowdle Company's loss of the pumps and the date it was notified that the pumps were available, and upon the rental basis of \$104 per month.

Plaintiff's suit was filed August 16, 1943. It stated that the equipment was sold October 29 and November 24, 1941. The pumps were brought to the project about September 8, 1941 and were missed the week end of October 12th. There were 58½ square miles of construction in progress at the project at the time. It was a 70 to 80 million dollar project. There were 87 subcontractors. The Engineering Company turned over equipment to the Army Engineers when there was no longer use for it. It turned the plant over to the United States War Department. The Dupont Company thereafter operated the plant. It in turn relinquished it to the War Department. Finally, the United States Rubber Company obtained the plant from the War Department. That Company found the pumps April 1, 1944, when it took possession.

The Engineering Company contends that Dowdle Company did not prove the lost pumps were part of the "goods" subject of plaintiff's Statement of Claim so as to come within the requirement



The Engineering Company answered through the United States District Attorney that it did not receive on any one pump and that it was not liable for any rent on account thereof. It averred that Bowles Company under its agreement was required to submit its claim to an arbitrator and that it had not done so. In answer to interrogatories filed by Bowles Company, the Engineering Company stated that it operated 25 to 40 pumps on the project; that when it vacated the premises it turned over to the United States engineers all of the equipment used by it; that the equipment was not inventoried; and that it did not have possession of, nor relinquish to the Engineers, the Bowles Company pump. It was stipulated that the record of the judgment was computed upon the 50 month interval between Bowles Company's loss of the pumps and the date it was notified that the pumps were available, and upon the rental basis of 10¢ per month. Plaintiff's suit was filed August 12, 1941. It stated that the equipment was sold October 20 and November 24, 1941. The pumps were brought to the project about September 8, 1941 and were placed the week end of October 12th. There were 500 pumps in use of construction in progress at the project at the time. It was a 70 to 80 million dollar project. There were 57 subcontractors. The Engineering Company turned over equipment to the Army Engineers when there was no longer use for it. It turned the right over to the United States War Department. The United States War Department operated the plant. It in turn relinquished it to the War Department. Finally, the United States War Department obtained the plant from the War Department. That Company found the pump April 1, 1942, when it took possession.

The Engineering Company contended that Bowles Company did not prove the lost pumps were part of the "goods" subject to Plaintiff's statement of claim so as to come within the requirement

claim of the of the Third Party Rule; that the/Dowdle Company exceeds the plaintiff's claim and is, therefore, a different suit; that it did not prove the Engineering Company appropriated the pumps to its own use; that the judgment is faulty in that it includes an award for the Homelite Pump when there is no evidence that the Engineering Company ever had possession of it; and that the judgment is excessive.

In its brief Dowdle Company accepts the Engineering Company's statement of the case. It was stated that the pumps in question were brought on to the project about September 6, 1941, and were lost the week-end of October 12th. The record shows the delivery by plaintiff of the pumps September 6th. Plaintiff's suit is based on sales dated thereafter. The Engineering Company argues accordingly that the subject matter is not the same. Plaintiff's claim is for value of the pumps or \$415.11, while the Dowdle Company's claim is for a far greater amount of rental. The Engineering Company insists this shows a different suit. We have not been shown that these contentions were made at the trial nor specified in the motion for a new trial. The contentions are, therefore, not before us.

The Dowdle Company's material clerk in charge of Equipment testified that after the loss of pumps was discovered, he reported the fact to the Superintendent of the Engineering Company; that about ten days later he saw the Nova pump in the repair department of the Engineering Company, bearing the latter's stencil #OE 331; that he went for a truck to remove the pump and when he returned, the pump was gone; that he reported this fact to the Superintendent who said he would try and locate the pump; and that no other contractor used the Engineering Company repair shop. T. P. Dowdle testified that the rental value of the pumps and fittings was \$104 per month under the O.P.A. regulations at the time; that he obtained the pumps on a rental basis; that he intended to use them

claim of the

of the Third Party Rule; that the Bowles Company exceeds the claim-

the claim and is, therefore, a different claim; that it is not

prove the Engineering Company represented the pump as it was

was; that the judgment is faulty in that it includes an award for

the Bowles Company when there is no evidence that the Engineering

Company ever had possession of it; and that the judgment is excessive.

In its brief the Bowles Company asserts the Engineering

Company's statement of the case. It was stated that the pump in

question was brought on to the project about September 2, 1941,

and was lost the week-end of October 1941. The report about the

delivery by plaintiff of the pump, September 28th, plaintiff's wife

is based on notes dated thereafter. The Engineering Company argues

concededly that the subject matter is not the same, plaintiff's

claim is for value of the pump or \$100.00, while the Bowles Company's

claim is for a far greater amount of rental. The Engineering Company

insists this shows a different suit. We have not been shown that

these contents were sent at the trial nor specified in the motion

for a new trial. The contents are, therefore, not relevant.

The Bowles Company's material claim in charge of equipment

testified that after the loss of pump was discovered, he reported

the fact to the Superintendent of the Engineering Company; that

about ten days later he saw the pump in the repair department

of the Engineering Company, bearing the latter's stamp (see 101);

that he went for a truck to remove the pump and when he returned,

the pump was gone; that he reported this fact to the Superintendent

who said he would try and locate the pump; and that no other

contractor used the Engineering Company repair shop. T. F. Bowles

testified that the rental value of the pump and fittings was \$100

per month under the G.P.A. regulations at the time; that he

obtained the pump on a rental basis; that he intended to use them

only a month; and that when he could not return them he had to pay the sale price. He reported the losses to the Engineering Company and demanded the return of the pumps.

The Engineering Company's general superintendent testified that the equipment used on the project belonged to the United States; that the Company used 50 to 75 pumps of the same type as the Dowdle Company Nova pump; that they used no Homelite pump; that the difference between the Dowdle pumps and the Government pumps was that the former had pneumatic tires; that the Engineering Company did not check the subcontractors equipment since it was not responsible therefor; that it marked its equipment O E to indicate "owned equipment"; that there were not enough pumps to warrant # O E 331; that a watch was kept for the pumps when the equipment was turned over; and that the Army Engineers knew of the loss of the pumps.

Pictures taken of the Nova pumps in December 1945 are in evidence. Defendant's witness who caused the making of the photographs says there was no # O E 331 on the pump and no indication that a number had been stencilled thereon. He said he was an officer of the United States Army Ordnance Department Motor Transportation Division; that he knew the values of engineering equipment; and that the value of the Nova pump, exclusive of connections, was \$205, and the Homelite \$210, at the time of the loss.

It will be seen that there is no evidence that the Engineering Company had the Homelite Pump in its possession. There is none that the couplings or hose connections or a tarpaulin were in its possession. The testimony with respect to the photographs does not aid Dowdle Company in this respect. Dowdle Company does not meet the Engineering Company's contention that the judgment should be reversed inasmuch as there is no way to allocate the damages between the Nova and the Homelite pumps. We cannot assume from testimony that the Engineering Company had possession of the Nova pump, that it also had possession







of the Homelite. Certainly we cannot place on that assumption the further assumption that it used the Homelite pump. There is no justification for a finding or award as to the Homelite pump. Plaintiff's witness testified he saw the Nova pump marked O E 331 in the repair department of the Engineering Company about 10 days after the loss. This witness was not seen by the court but defendant stipulated to have his testimony read. His testimony is refuted, not directly, by the various records of the Engineering Company and the United States Army Ordnance Department; circumstances of the relation between the Engineering Company and the Army Engineers; and the testimony of the Army Officer respecting the photographs. A letter introduced by plaintiff, written by a War Department Ordnance officer says that the records reveal no marking such as O E-331.

Engineering Company admits the pumps were and are the property of Dowdle Company. It does not dispute that a bailment arose between it and Dowdle Company. Its position is that it did not have possession of, and did not use, the pumps and, therefore, could not return them. Both parties cite Cottrell v. Gerson, 371 Ill. 174. There equipment, pledged for accrued rent, was wrongfully withheld and used by the landlord. The court said that damages for use of property detained, in excess of the value of the property, have been sustained. But a forth coming bond under the Replevin Statute was there involved. A different situation is presented here.

There is no testimony whatever that the Engineering Company had possession of the Homelite pump nor of the couplings or hose connections. Yet testimony of the rental value of these items is in evidence. There is no testimony that the Engineering Company had possession of a lost tarpaulin, yet there is testimony

of the Henshaw. Certainly we would place on that assumption  
the fact that it is not the Henshaw's own. There is  
no justification for a finding of fault as to the Henshaw's  
plaintiff's witness testified he saw the Henshaw's car in the  
in the repair department of the Engineering Company about 10 days  
after the loss. This witness was not seen by the court but  
defendant attempted to have his testimony read. His testimony  
is refused, not directly, by the various records of the Engineering  
Company and the United States Army Ordnance Department; the  
of the relation between the Engineering Company and the Army  
Engineers; and the testimony of the two officers mentioned in  
photographs. A letter introduced by plaintiff, written by a  
Department Ordnance Officer and the records which he received  
such as 0-231.

Engineering Company admits the same facts and the fact  
property of Cordis Company. It does not dispute that a witness  
evidence between it and Cordis Company. Its position is that it did  
not have possession of any old car and the same was destroyed,  
and not return them. Both parties are entitled to a trial.  
111. 174. There is no evidence, except for several years, and plaintiff  
witness and used by the defendant. The court said that plaintiff  
has not sufficiently established its case of the value of the car and  
have been retained. But a party cannot deny what the plaintiff  
states was their property. A different situation is presented here.  
There is no testimony whatever that the defendant

Company had possession of the Henshaw's car at the time of the  
or even immediately. Yet testimony of the value of the car  
itself is in evidence. There is no testimony that the defendant  
Company had possession of a lost property, yet there is testimony

of its value. We believe, moreover, that the finding of possession and use, especially the latter, of the Nova pump is against the manifest weight of the evidence presented by defendant and to some extent by plaintiff.

For the reasons given the judgment is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

LEWE, P.J. AND BURKE, J. CONCUR.

of its value. To believe, moreover, that the liability of possession  
and use, especially the latter, of the same thing is against the  
beneficial object of the evidence presented by defendant and to  
most extent by plaintiff.  
For the reasons given the judgment is reversed and  
the case is remanded for further proceedings.  
REVEREND AND HONORABLE

WILLIAM J. BROWN, J. CLERK.

STATE OF ILLINOIS  
APPELLATE COURT  
FOURTH DISTRICT  
FEBRUARY TERM, A.D. 1948

143  
63

Term No. 47023

Agenda No. 17

ANITA DIETZ, )  
 )  
Plaintiff-Appellant, )  
 )  
vs. )  
 )  
THE FIRESTONE TIRE & )  
RUBBER COMPANY, a )  
Corporation )  
 )  
Defendant-Appellee. )

3381.A.654

Appeal from the

Circuit Court of

St. Clair County

CULBERTSON, P.J.

This is an appeal from a judgment of the Circuit Court of St. Clair County, Illinois, entered by the Court below against the Plaintiff-Appellant, ANITA DIETZ (hereinafter called plaintiff) and in favor of Defendant-Appellee, THE FIRESTONE TIRE & RUBBER COMPANY, a Corporation (hereinafter called defendant). On trial of the cause in the Court below a jury had found the defendant guilty and had assessed damages at \$600.00. Thereafter the Court entered judgment against the plaintiff on the motion of defendant for judgment notwithstanding the verdict and it is from this judgment of the Circuit Court that this appeal is prosecuted.

The action arose by reason of injuries sustained by plaintiff, presumably caused because of an accumulation of ice on the sidewalk in front of the property leased by defendant. The original complaint charged negligence on the part of the City of Belleville and certain other individual defendants, in addition to the defendant, The Firestone Tire & Rubber Company. It was alleged that defendants were guilty of combined acts of negligence in maintaining a downspout which permitted water to be discharged upon the public sidewalk and a portion of the driveway and premises occupied by defendant, The Firestone Tire & Rubber Company. It was alleged





that the water accumulated in a depression in the sidewalk where it became frozen and created a hillock or bulge.

On trial of the cause the evidence simply tended to show that there was no crack or uneven sidewalk in front of the premises occupied by the defendant, and there was no noticeable depression in the sidewalk in front of the premises. The sidewalk was built in the fall of 1945 and has a slightly slanting character, toward the curb, because there was a wide drive from Main Street into the filling station run by defendant. The general slope of the sidewalk the greater part of the way is to permit automobiles to go in and out of the filling station. It was shown by the evidence that the water from the downspout was discharged onto the ground about six inches from the front of a building belonging to other individuals than the defendant, The Firestone Tire & Rubber Company. The downspout was not on the property under control of defendant, The Firestone Tire & Rubber Company. The water from the downspout simply spread out and moved across a portion of the sidewalk under the control of the defendant, The Firestone Tire & Rubber Company. There was no indication that there was any piled ice on the sidewalk nor any clump of ice, but the only evidence was that ice had been formed from snow and that after plaintiff fell on the sidewalk she pushed the snow off the ice and discovered that there was ice at that point. Defendant had filed the usual motions for directed verdict, upon which the Court had reserved its ruling. As indicated previously, the jury found in favor of plaintiff and assessed her damages at \$600.00. Upon the motion for judgment notwithstanding the verdict and for a new trial by the defendant the Court allowed the motion for judgment notwithstanding the verdict and entered judgment in favor of defendant and as against plaintiff for costs. Plaintiff filed a motion for judgment on the verdict, but did not file a motion for new trial.

As the Courts have repeatedly announced, a motion to direct a verdict or for a judgment notwithstanding the verdict should be



allowed when all of the evidence is considered with all reasonable inferences to be drawn therefrom in its aspect most favorable to the party against whom the motion is directed, and that if there is then a complete failure to prove one or more of the necessary elements of the case, such a motion can be allowed (1947 ILLINOIS REVISED STATUTES, Chapter 110, Paragraph 259.22; CARRELL vs. N.Y.C. R.R. CO., 384 Ill. 599, 603).

In the instant case, before plaintiff was entitled to recover it was necessary that she establish that there was an obstruction in the pathway, or a condition which was of such magnitude as to be dangerous, and that the particular obstruction or condition caused her to fall and that the obstruction or condition was on the pathway for such a period of time that defendant should have had reasonable notice of it being there so that defendant could have removed or otherwise protected as against the obstruction or condition (THIEN vs. CITY OF BELLEVILLE, 331 Ill. App. 337, 345; BOENDER vs. CITY OF HARVEY, 251 Ill. 228).

In the case of LOYD vs. CITY OF EAST ST. LOUIS, 235 Ill. App. 353, at page 357, the Court stated that while an abutting property owner cannot be forced to keep the sidewalk adjoining his property free from ice and snow he would be held responsible for a dangerous condition which was directly caused by him. In the instant case there was no evidence of any direct causation by defendant, The Firestone Tire & Rubber Company, and no showing of any facts sufficient to establish constructive notice or actual notice of a dangerous condition of the sidewalk so far as the defendant was concerned. The testimony of the plaintiff was that she herself saw no unusual condition of the sidewalk even though there was only a scum of snow at the point and there was no showing that the ice at the place where plaintiff fell was greater or different in magnitude than elsewhere in the City. There were no "hillocks or ridges" which would necessarily render passage along the walk dangerous (THIEN vs. CITY OF BELLEVILLE, supra; BARKER vs. CITY OF ROCKFORD,

1900-1901 (1900-1901) (1900-1901) (1900-1901) (1900-1901)

1900-1901

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1900-1901 (1900-1901) (1900-1901) (1900-1901) (1900-1901)



239 Ill. App. 528, 531; METZGER vs. CITY OF CHICAGO, 103 Ill. App. 605, 608).

Under the facts and circumstances in the instant case, in view of the failure of plaintiff to show specifically either that the dangerous condition was known or should have been known to defendant, or that it had a special and dangerous character such as being accumulated in hillocks or ridges, so as to put defendant on actual or constructive notice of a condition which was different than that which obtained generally in the City, the Court below properly allowed the motion for judgment notwithstanding the verdict. The judgment of the Circuit Court of St. Clair County is, therefore, affirmed.

Judgment affirmed.

Justice Bardens concurring

Abstract

FILED  
FEB 25 1940  
*Shirley Brown*  
CLERK OF THE APPELLATE COURT  
SOUTH DISTRICT OF ILLINOIS



333  
Gen. No. 10159

In The

APPELLATE COURT OF ILLINOIS

Second District

May Term, A. D. 1947

ROSE KARLOCK, Administrator of the )  
Estate of Frank Karlock, )  
Deceased, )  
Plaintiff-Appellee, )  
vs )  
NEW YORK CENTRAL RAILROAD COMPANY, )  
A Corporation, )  
Defendant-Appellant. )

Appeal from

The Circuit Court of  
Kankakee County

Hon. C. D. Henry,  
Judge Presiding

333 I.A. 655

Bristow, J.

This is an appeal by the defendant New York Central Railroad Company, a Corporation, from a judgment of the circuit Court of Kankakee County in favor of plaintiff Rose Karlock, administrator of the estate of Frank Karlock, deceased, in a proceeding for damages for the death of Frank Karlock from injuries sustained in a collision between his truck and one of the defendant's trains.

The primary issue presented by this appeal is whether the Circuit Court erred in refusing at the close of plaintiff's case, and again at the close of all the evidence, to instruct the jury to find the defendant not guilty.

It is an established principle of law that a court must deny a motion for a directed verdict or for a judgment notwithstanding the verdict where plaintiff's evidence and the reasonable inferences therefrom tends to prove the cause of action. (Ziraldi v. Lynch Co., 365 Ill. 197, 199; Libby, McNeil & Libby v. Cook, 222 Ill. 206; Knudson v. Knudson, 282 Ill. 492.)

It is therefore incumbent upon this court to determine whether the evidence establishes the essential elements of plaintiff's case, to wit, that defendant was guilty of negligence which proximately caused the death of the deceased, and that the deceased was in the exercise of due care for his own safety.

REPUBLICAN COURT OF INDIANA

Second District

May Term, 1914

James E. ...  
The Plaintiff, ...  
vs.  
The Defendant, ...

JOHN K. ...  
State of ...  
vs.  
The Defendant, ...  
A ...  
vs.  
The Defendant, ...

Witness, ...

This is an appeal from the judgment of the Circuit Court of ...  
County, Indiana, rendered in the case of ...  
vs. ...  
The plaintiff, ...  
vs.  
The defendant, ...  
and one of the defendant's ...

The record shows that the plaintiff ...  
District Court ...  
again to the ...  
the defendant ...

It is ...  
a ...  
various ...  
from ...  
T. J. ...  
Kutner, ...

It is ...  
the ...  
to ...  
the ...  
the ...

The salient facts appearing in the record are that at approximately 12 o'clock on October 3, 1944 plaintiff's deceased was driving his International truck loaded with several tons of coal in an easterly direction on Court street, one of the main business thoroughfares in Kankakee, toward and over defendant's railroad crossing. INasmuch as the physical features of the area bear upon the issues of defendant's negligence and deceased's exercise of due care for his own safety, it is essential to consider the immediate environs in which the collision occurred.

Court street, a much traversed road over which some 1300 cars pass daily, according to the testimony of plaintiff's witnesses, runs east and west. It is crossed by the tracks of the defendant railroad which run in a northerly and southerly direction. Many streamliners, including the James Whitcomb Riley, with which the deceased collided, pass over this railroad intersection. Plaintiff's deceased was approaching the tracks from the west and defendant's train was proceeding toward the crossing from the south.

According to the testimony of Isabelle Legg, one of the plaintiff's witnesses, who was sitting at a desk in the front window of her filling station located some 50 feet northwest of the tracks, which testimony was corroborated by two other witnesses, there is a garage on the southwest side of the tracks, the east end of which is 51 feet from defendant's right-of-way. There are other buildings west of the garage, with only some 2½ feet between them. On the date of the collision there was a large semi-trailer truck approximately 34 feet 10 inches long, between the garage and the railroad, which was parked some 15 feet from the tracks and obstructed the view to the south.

The witness, Vance Kime, testified that there was also a car parked between this trailer truck and the tracks, and a tall sign between the garage and the tracks.

On each side of the crossing are illuminated signs with the word "STOP" written vertically on them. It is not apparent from the signs, according to the testimony of all of the witnesses, whether or not a train is approaching and there are no additional warning signals of any kind.





Plaintiff's witness, Isabelle Legg, stated that she saw deceased's truck slowing down to 10 or 15 miles an hour for the crossing, and that thereafter she looked away to attend to her phoning so that she did not see, but merely heard, the crash. The witnesses Vance Kime and Harold Posing rushed out of the garage where they were working when they heard the crash, and found Frank Karlock caught in the cab of his truck between the coal and the cowl. He told them that he couldn't see the train because of the semi-truck which blocked the view to the south. It took half an hour to get the deceased out of the truck and he was then taken to the hospital where he died that same night.

The deceased was 48 years old, and was the father of two children, ages 14 and 18. He had been engaged in farming from which he earned between \$5,000 and \$6,000 the preceding year. His wife testified moreover, that he had been in good health; that he did not wear glasses; that his hearing was good; and that he never had an accident in over 25 years of driving. In that connection, the witness Charles Grey, a friend and business associate of the deceased for some 25 years, testified that he was a reasonably prudent and cautious man.

In support of its contention that the deceased did not exercise due care for his own safety and that the view to the south was not obstructed, defendant offered the testimony of Art Prince who stated that the semi-trailer was some 40 feet from the tracks, and that of two other witnesses who maintained that from a point 75 feet west of the center of the west track the view to the south was clear for a distance of approximately 2,000 feet. Their observation, however, was not made on the date of the collision and there were no trailers, cars or signs between the garage and the tracks at that time.

Defendant also offered in evidence a certified copy of an order entered by the Illinois Commerce Commission on April 24, 1929, some 15 years prior to the collision, wherein the Commission denied a petition filed by the City of Kankakee to require the defendant railroad company to maintain a watchman at this crossing on the ground that it was extra hazardous since there had been numerous accidents involving the loss of many lives at that intersection, and ordered instead, the erection of illuminated "stop" signs on each side of the track.



On the basis of the foregoing facts and the circumstances, the Circuit Court submitted the cause to the jury which returned a verdict of \$5,200 on which the court entered judgment.

Defendant contends that the trial court erred in refusing to grant its motion to exclude evidence offered to show the habits of deceased; that there was no evidence that the deceased was in the exercise of due care, but on the contrary, that he was guilty of contributory negligence; that plaintiff failed to prove any negligence on the part of defendant; and that the court erred in submitting certain instructions to the jury on behalf of plaintiff.

In an action for personal injuries caused by negligence, plaintiff must prove that the injured party was in the exercise of due care for his own safety. Where, however, direct testimony of due care by an eye witness is not available, the law, as a matter of necessity, permits that element to be inferred from the circumstances and from testimony of the careful habits of the deceased. (Illinois Central, R. R. Co., v. Nowicki, 148 Ill. 29; Stollery v. Cicero Street Ry. Co., 243 Ill. 290, 293)

Defendant insists that this exception is not applicable to the instant case on the ground that there were witnesses who saw the deceased up to the instant of the collision, and that, therefore, the testimony of Mrs. Karlock that deceased was a good provider, a hard worker, and in good health, possessed of all his faculties, and never had an accident in 25 years of driving, as well as the testimony of the witness Grey, a friend of 25 years standing, that deceased was a reasonably prudent and cautious man were improperly admitted in evidence.

In support thereof, defendant cited Cox v. Chicago & Northwestern Ry. Co., 92 Ill. App. 15, and Anderson v. Metropolitan West Side El. Ry. Co., 170 Ill. App. 210. In the Cox case, the court held that it was not error for the lower court to have rejected evidence of the deceased's habits of due care where witnesses saw the deceased in his buggy on the first of three tracks, and he was killed on the middle track. The court stated that inasmuch as the witnesses saw all of the circumstances up to the instant of the collision, it could fairly be said that there were eye witnesses.

On the basis of the foregoing facts and the circumstances, the Official Court concluded that the Government's evidence was sufficient to establish the defendant's guilt beyond a reasonable doubt.



In the instant case, however, the only witness who saw deceased before the collision testified that she saw his truck slowing down while he was still west of her filling station which is over 50 feet from the defendant's tracks. Under these circumstances it cannot be contended that she was an "eye witness" or that she saw deceased up to the instant of the collision. Therefore, defendant's objection cannot be sustained.

Moreover, the testimony of Mrs. Karlock and of Grey that deceased never had an accident in over 25 years of driving and that he was a reasonably prudent and cautious man, tend to establish that deceased was an habitually careful driver, for both Mrs. Karlock and Grey, who had known deceased both socially and through working with him, were in a position to observe and know the driving habits of the deceased.

Irrespective of the admission of this testimony, the element of due care could be inferred from other direct testimony and from the circumstances surrounding the collision. The witness, Isabel Legg, stated that while the deceased was still west of her filling station, he had already slowed down his truck to 10 miles per hour, and that the view to the south from which the train was approaching was obstructed by the garage on the southwest side of the street and by the semi-trailer which extended to within some fifteen feet of the tracks. The testimony of the witnesses, Vance Kime and Harold Posing, who ran out of the garage when they heard the crash, corroborated the fact that the view was obstructed. Vance Kime added that there was a car between the trailer and the tracks, and a large sign some 10 feet from the tracks, and that the deceased had stated that he could not see the train because the semi-trailer blocked the view.

The testimony of defendant's witnesses who viewed the crossing at a later date is of limited persuasive value since there was no trailer or car parked in the area at that time. Similarly, defendant's photographs taken from diverse positions at a later date in no way tended to prove just how much of the track could reasonably have been seen by deceased from his position in the road immediately prior to the collision.



There is some conflict in the evidence, however, as to the distance between the semi-trailer and the tracks, but considering this evidence and the inferences therefrom most favorably to the plaintiff, as this court must properly do under the established principles of law, it appears that deceased would have to be closer than 15 feet from the tracks to see the train approaching, and even then, there was a car obstructing the view to the south. In addition thereto, it is admitted that there were no automatic signals or other devices to warn deceased of the approach of the train, and from the "stop" sign at the crossing, it was not ascertainable whether or not a train was coming.

While, admittedly, a traveler must make use of his sense of sight and hearing and exercise care commensurate with the danger to be anticipated in approaching a crossing, (Carrell v. New York Central Railroad Company, 384 Ill. 599) it is not a rule of law that the omission of the duty to look and listen will bar recovery where there are facts excusing performance of that duty. (G. & A. R. R. Co. v. Pearson, 184 Ill. 386, 391; G. & E. I. R. R. Co. v. Schmitz, 211 Ill. 446.)

Under the foregoing facts and circumstances, it was a proper question for the jury as to whether or not the deceased was in the exercise of due care just prior to and at the time of the accident. (Althoff v. Ill. Gen. R.R. Co., 227 Ill. App. 417) The ruling of the trial court in submitting this issue to the jury was, therefore, in accordance with the law and not in error.

It would serve no useful purpose to distinguish the cases cited by the defendant, and such an analysis would extend beyond the reasonable confines of a judicial opinion. It is sufficient to note, however, that in the cases where the court held as a matter of law that due care had not been proved and a verdict for defendant was directed the view of the approaching train was unobstructed, or, as in Mouly v. New York Central Railroad Co., 385 Ill. 446, where the crossing was obscured, there was evidence that the plaintiff deliberately speeded up after he had seen the train.



With reference to the issue of negligence, defendant contends that the trial court should have properly directed a verdict in favor of defendant on the ground that plaintiff failed to prove any negligence on the part of defendant.

Plaintiff charged and submitted evidence to prove that Court street is a much traversed highway over which some 1300 cars pass daily, and that it is an extra hazardous crossing at which numerous persons have lost their lives. There are, nevertheless, no automatic warning signals or flagmen or other devices other than a vertical sign with the letters spelling "stop" by which it is not ascertainable whether or not a train is approaching. It appears that in 1929, the City of Kankakee petitioned the Illinois Commerce Commission for an order requiring the defendant railroad to maintain a watchman at the crossing on the ground that it was extra hazardous. The petition was denied, and the Commission merely ordered the installation of the aforementioned vertical signs. Defendant insists, therefore, that inasmuch as it complied with the requirements of the Commission, it could not be deemed guilty of negligence.

It would appear that there is a conflict in the decisions of our appellate divisions with reference as to whether a railroad which complies with the existing regulations of the Commerce Commission can be held guilty of negligence.

In McMullen v. Illinois Central R. R. Co., 234 Ill. App. 416, the court adopted the rule enunciated by the United States Supreme Court in the leading case of Grand Trunk Railroad Company v. Ives, 144 U. S. 408, 12 S. Ct. 679, wherein the court stated: "The underlying principle in all cases of this kind which requires a railroad company not only to comply with all statutory requirements in the matter of signals, flagmen, and other warnings of danger at public crossings, but many times to do much more than is required by positive enactment, is that neither the legislature nor railroad commissioners can arbitrarily determine in advance what shall constitute ordinary care or reasonable prudence in a railroad company at a crossing, in every particular case which may afterwards arise..."



that the trial court should have properly instructed the jury that the defendant on the night that the murder occurred was not the only person who was in the house.

A similar rule was followed by the Illinois Supreme Court in Chicago B. & Q. Railroad Company v. Perkins, 125 Ill. 127, and in Wagner v. Toledo, P. & W. R. R., 352 Ill 85, quoted with approval by THE Illinois Appellate Court in Willett v. Baltimore & O. S. W. R. Co., 284 Ill. App. 307. In the Wagner case it was stated at page 91: "A railroad company in the running of its trains is required to exercise ordinary care and prudence to guard against injury to those who may be traveling upon the public highway and crossing its tracks. The fact that the statute may provide one precaution does not relieve the company from adopting such others as public safety or common prudence may dictate.

Defendant argues that the Wagner case can be distinguished from the case at bar on the ground that the Commerce Commission therein had not made any orders with reference to the signs at the crossing. The pronouncements of the court, however, permit no such restricted interpretation, for at p. 90 the court stated: "But regardless of the situation produced by the failure to prove an order of the commission, there is a common law duty devolving upon railroads to exercise such care and use such precautions as will enable the traveler on the highway, if he exercises ordinary care, to ascertain in the night time the approach of a train over a street crossing...Special conditions creating special hazards at crossings require a watchman, gates or other warning to travelers."

It is the opinion of this court that this view is consistent with American principles of jurisprudence whereby trial by jury is a fundamental concept, and a holding that compliance with the Commerce Commission rulings barred an inference of negligence as a matter of law, would be tantamount to the abolition of a jury in all cases where the commission had entered an order. It would mean, furthermore, that the Commission would determine far in advance of a case what the standard of reasonable conduct would be, irrespective of any special or intervening circumstances, a result contrary to the common law system.

In the instant case, as far back as 1929, it was the opinion of the authorities of Kankakee that this much traversed crossing was extra hazardous because of the numerous accidents that had occurred, and that it warranted a watchman. The Illinois Commerce ordered the aforementioned signs as a minimum standard, but that order did not



relieve the defendant of its common law duty to exercise ordinary care and prudence to guard against injury to those travelling on the highway and crossing its tracks. It was for the jury, therefore, to determine whether this stop sign complied with that duty, and, in submitting the issue of negligence to the jury in the instant case, the trial court did not err.

Defendant contends finally that the court erred in submitting certain instructions to the jury on behalf of plaintiff. Instruction number 1 merely reiterated the rule of law propounded by the court in the Wagner case, supra, and the use of the words "Running of its trains" could not reasonably mislead the jury as to the issue of the case, for that expression is broad enough to include the operation of safety devices at crossings. Moreover, the modern tendency favors the liberal application of the harmless error doctrine to instructions. (Kavanaugh v. Washburn, 320 Ill. App. 250.) As stated by Justice Cardozo in Wood v. Duff Gordon, 248 N. Y. 339, "The law has outgrown its primitive state of formalism when the precise word was the sovereign talisman, and every slip was fatal. It takes a broader view today."

In instruction 2 based upon the Willett and McMullen cases, supra, where the particular proposition of law was promulgated and approved. Instructions Number 5 and 6 were approved by the courts in Rautman v. Chicago Consolidated Traction Co., 156 Ill. App. 457, 460, and in Bernier v. Ill. Central R. R. Co., 296 Ill. 464, respectively. Instruction Number 7 was passed upon in Illinois Central R. R. Co. v. Nowicki, 148 Ill. 29, and, while it is a statement of a general proposition of law, it could not reasonably mislead the jury in the light of the other instructions.

On the basis of the foregoing analysis, it is the judgment of this court that the evidence contained in this record, and the reasonable inferences therefrom, presented the essential elements of plaintiff's cause of action and warranted the submission of that cause to the jury. The trial court, therefore, did not err in refusing to instruct the jury to find the defendant not guilty. The jury which returned a verdict in favor of plaintiff, and the trial court which entered judgment thereon, heard the witnesses and could weigh the pro-





bative value of their testimony, it is not the province of this appellate court, therefore, to reweigh that evidence and substitute its judgment for that of the trial court. (Heil v. Kastengren, 328 Ill. App. 301.) The judgment of the trial court must, therefore, be affirmed.

JUDGMENT AFFIRMED.

before value of their services, it is not the intention of this committee  
to make any statement, or to make any statement, or to make any statement,  
for that of the said committee. That it is the intention of this committee,  
for that of the said committee, or to make any statement, or to make any statement.

Witness my hand and seal this 1st day of June, 1864.

Gen. No. 10186

Agenda No. 8

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

OCTOBER TERM, A. D. 1947

CLAY GANTZ  
Plaintiff-Appellee

vs

RUSSELL YOUNG and HARRY

E. WESTBROOK  
Defendants-Appellants

338 I.A. 655

APPEAL FROM THE  
CIRCUIT COURT OF  
WINNEBAGO COUNTY

Dove, J.

Plaintiff, Clay Gantz, recovered a judgment in the Circuit Court of Winnebago County for \$566.32 against the defendants, Harry E. Westbrook and Russell Young for damages to his automobile amounting to \$491.32 and \$75.00 expended by him for the rent of an automobile while his automobile was undergoing repairs. There is no question presented as to the sufficiency of the pleadings and the issues so made were submitted to the court for determination resulting in a judgment for the plaintiff for the full amount claimed. To reverse this judgment the defendants prosecute this appeal.

The evidence disclosed that on August 24, 1946 about 8:30 A.M. appellee, accompanied by his wife, was driving his Pontiac sedan east on Auburn Road a few miles north of Rockford. Auburn Road is a black-top road eighteen

Y

The witness believed that on January 10, 1968  
about 2:30 A.M. again, accompanied by one other man,  
arrived his home and again went to kitchen where a few minutes  
north of house.

or twenty feet wide, running east and west. West Heights Road is a gravel road sixteen or eighteen feet wide and enters Auburn Road from the south but does not continue across Auburn Road to the north. There is a private driveway, however, opposite the entrance of the West Heights Road leading through a field to the north, entrance thereto being through a barb-wire gate.

Upon the morning in question, appellant Russell Young was driving a Dodge one and one-half ton truck with dual wheels, belonging to appellant Westbrook who was in the car with Young and they had entered Auburn Road between sixty-five and eighty rods west of this private road and were proceeding east along Auburn Road and intended to turn north into this private road. It was while making this turn to the left that the collision occurred. The weather was clear, the road surface dry, the sun was shining and the visability good.

Counsel for appellants call attention to the Motor Vehicle Act (chap. 95 $\frac{1}{2}$ , par. 155, Sec. 58 (b) 2, Ill. Rev. St. 1945) which provides that no vehicle shall, in overtaking and passing another vehicle or at any other time be driven to the left side of the roadway when approaching within 100 feet of any, or traversing any intersection, and argue that the West Heights road intersected the Auburn Road and in attempting to pass appellant's truck appellee violated these statutory provisions and was guilty of negligence which proximately caused the collision. Counsel also argue that the story of the accident, as related by appellants to the effect that the driver of the





truck put his arm out of the window when the truck he was driving was 75 or 80 feet west of the private driveway should convince this court that the appellants were not guilty of negligence and that appellee was not in the exercise of due care at and before the time of the collision.

The plaintiff and his wife testified and gave their version of how the collision occurred. Mr. Westbrook testified and gave his and the deposition of Russell Young was read. The testimony of these four occurrence witnesses cannot be reconciled. William Christian, who did not see the accident, but who came to the scene of the collision shortly thereafter was the only other witness and he testified to the position of the truck and car when he arrived. We have read all the evidence as abstracted, examined the photographs and exhibits appearing in the record and read the statement of the trial court giving his reasons for his findings.

The only questions presented to this court are questions of fact. The conclusions arrived at by the trial court to the effect that the driver of defendant's truck was negligent and that the plaintiff was in the exercise of due care are sustained by the evidence and in that condition of the record, the judgment of the trial court must be affirmed.

Judgment affirmed.



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Abstract

Gen. No. 10194

Agenda No. 11

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

4428

OCTOBER TERM, A. D. 1947

339 I.A. 656

DONALD BERGSTROM  
APPELLANT

VS

PAUL G. LIND, JR.  
APPELLEE

APPEAL FROM THE  
COUNTY COURT OF  
ROCK ISLAND COUNTY

Dove, J.

This action, brought to recover damages which the plaintiff sustained when his automobile was struck by a car being driven by the defendant, originated before a Justice of the Peace. Upon appeal to the County Court of Rock Island County the cause was heard by the court, a jury having been waived and resulted in a judgment in favor of the defendant and this further appeal followed.

The evidence discloses that Seventh Avenue in the city of Moline runs east and west. About eleven o'clock on the evening of January 31st, 1947 the car of the plaintiff was parked on Seventh Avenue facing east some six inches from and parallel with the curb on the north side of the Avenue





between Twenty-fifth and Twenty-sixth streets. There were no lights on the plaintiff's car and there were no street lights in the block between Twenty-fifth and Twenty-sixth streets. The night was clear and the pavement was covered with packed snow and ice. The defendant was driving his father's car <sup>north on 27th Street</sup> and at the intersection of Seventh Avenue and 27th Street, turned west, driving approximately 20 to 25 miles per hour; the headlights on the car he was driving were good and threw a beam of light a distance of 200 to 300 feet and the brakes were good. The defendant was nineteen years of age and in the car with him were five other high school students. Melbert Peterson, one of them, was riding in the front seat with the defendant. Neither Peterson or the defendant saw the parked car of the plaintiff until it was too late for the defendant to avoid the crash. The car which the defendant was driving, struck the front end of the plaintiff's car forcing plaintiff's car backward approximately five feet into the front end of another car which was parked behind the car of the plaintiff.

During the period from sunset to sunrise every motor vehicle which is standing on any highway shall display a light on the front end. (Ill. Rev. Stat. 1945, chap. 95 $\frac{1}{2}$ , sec. 202.). Counsel for appellant concede that this statutory provision was not complied with by appellant but argue that the parking of his automobile upon Seventh Avenue without any lights is not of itself negligence and cite Blachek vs. City Ice & Fuel Company, 211 Ill. App. 1; Kessler v. Washburn, 157 Ill. App. 532 and Collins vs. McMullin, 225 Ill. App. 430.

We have read these cases and the principles of law



which they enunciate are well settled. It is equally well settled that contributory negligence on the part of a plaintiff will bar a recovery, that the question of contributory negligence is a question of fact and that the findings of the court in a trial before a court without a jury, are entitled to the same weight as the findings of a jury and will not be set aside unless against the manifest weight of the evidence. (The Illinois Central Railroad Co., v. Oswald, 338 Ill. 270; Broderick v. O'Leary, 112 Ill. App. 658.) The trial court heard the testimony of the witnesses and found that under all the facts and circumstances in evidence the plaintiff was guilty of contributory negligence. This finding is supported by the record and cannot be said to be manifestly against the manifest weight of the evidence.

The defendant in this action was a minor. Counsel for the plaintiff should have called that fact to the attention of the court and a guardian ad litem should have been appointed to appear for and represent him. Johnson v. Turner, 319 Ill. App. 266; Rapp v. Goerlitz, 314 Ill. App. 189. The judgment appealed from, however, is in his favor.. He was respresented by counsel and that judgment will be affirmed.

Judgment affirmed.

9 The defendant in this action is a minor and in accordance with approved practice the trial court appointed a guardian ad litem to represent him. The judgment is sustained by the evidence and that judgment is affirmed.



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Abstract

Gen. No. 10197

Agenda No. 14

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

453

OCTOBER TERM, A. D. 1947

830 A. 656

GORDON B. DUNN  
Plaintiff-Appellee

vs

PAUL E. BERTRAM  
Defendant-Appellant

APPEAL FROM THE  
CIRCUIT COURT OF  
STEPHENSON COUNTY

Dove, J.

This is an action brought by Gordon B. Dunn against the defendant, Paul E. Bertram, to recover damages to his automobile occasioned when the car of the plaintiff and the car of the defendant collided on October 24, 1946 on Route No. 20 about four miles west of Freeport, Illinois.

Count one of the complaint charged the defendant with negligence in the operation of his car at the time and place in question and count two charged the defendant with wilful and wanton misconduct. The defendant answered denying the material allegations of the complaint. A hearing of the issues made by the pleadings was had by the court without a jury, resulting in finding the defendant guilty as to count one and not guilty as to count two. The court assessed the damages which the plaintiff sustained at \$1145.78 and judgment for this amount and





costs was rendered and the defendant prosecutes this appeal.

The record discloses that about four o'clock on the afternoon of October 24th, 1946 the plaintiff, unaccompanied, was driving his Cadillac automobile in an easterly direction on a paved highway, State Route No. 20. The defendant, accompanied by his wife Margaret Bertram, and their baby daughter, was driving his wife's Plymouth automobile in an easterly direction on this highway, having entered it from a gravel road at Harlem Corners and was going to his home which was located on the north side of Route No. 20 between two hundred and seventy-five and three hundred feet east of Harlem Corners. It was raining but the visibility was good. Defendant testified that before entering the paved highway he stopped, looked in both directions, permitted one car which was going east, to pass but did not see appellee's car or any other vehicle of any kind, although the pavement was straight and level and he could see sixteen or eighteen hundred feet west. Appellant then entered Route No. 20 and proceeded east in second gear and was driving between ten and fifteen miles per hour on the right or south side of the pavement. When he reached a point between seventy-five and one hundred feet west of the driveway leading into his home he looked in his rear view mirror, could see six or seven hundred feet to the rear and saw no car coming from the rear and no car was coming from the east going west. He then gradually angled to the northeast across the center of the pavement into the north traffic lane and when the four wheels of his <sup>had</sup> car/left the paved portion of the highway and he was entering his driveway with ~~the~~ only the rear bumper of his car

points was removed and the statement was made in this regard.

The second disclosure was made on 11/10/50

on the afternoon of August 1950, 1950 and 1951, and

consequently, was driving his Cadillac automobile in an easterly

direction of a road slightly above 90° to 100° and

accompanied by the wife of the driver, and their

daughter, was driving with the driver's automobile in an

easterly direction on this highway, having arrived in from a

travel road at Indian Junction and was going in an easterly

and located on the north side of road and on between two

hundred and seventy-five and three hundred feet east of

Indian Junction, at the same time and was driving west

and, consequently, arrived at the same time and

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extending across the north edge of the pavement, he heard a horn and almost immediately thereafter the left rear wheel and fender of appellant's car was struck by the right front fender of the Cadillac. The defendant further testified that the first time he saw plaintiff's car was after the collision when both cars had come to rest in the ditch on the north side of the highway, appellant's car being on the south side of and parallel with appellee's car and both cars were quite close and both headed northeast. The testimony of appellant was corroborated by his wife.

The plaintiff testified that on the afternoon in question, he was proceeding in an easterly direction on State Highway No. 20 driving between forty and forty-five miles per hour, that the pavement was straight and level and some seven hundred feet to the west he observed appellant's car come on to the highway from the north and proceed east in its south or proper traffic lane; that he noticed the slow speed at which appellant was traveling and when appellee was approximately three hundred feet to the west or rear of appellant's car, he, appellee, was "edging" his car across the black line which marks the center of the pavement and into the north traffic lane. Appellee continued to sound his horn and as he expressed it "kept working" to the north side of the pavement in order to go around appellant's car on the north or left side thereof. As appellant's car continued into the north traffic lane appellee turned the left wheels of his car off the pavement and on to the north shoulder of the highway in order to avoid striking appellee's car. The left rear wheel and left rear fender of appellant's car was struck





by the right front fender and right side of appellee's car. Appellee further testified that he drove upon the shoulder in order to miss defendant's car and was in the act of passing or attempting to pass at the time of the impact.

Counsel for appellant argue that the judgment is against the manifest weight of the evidence and that under the evidence, appellee, as a matter of law, was guilty of contributory negligence.

The record shows/<sup>without</sup>contradiction that for some time prior to the collision there were no other cars upon this section of the highway other than the cars being driven by the parties hereto. The pavement was wet but straight and level. It was daylight and the visibility reasonably good. At the time appellee's car was approximately 700 feet west of Harlem Corners, appellee observed appellant's car. He was driving between forty and forty-five miles per hour. Appellant entered the highway, turned east and was proceeding in his proper traffic lane in second gear not over 15 miles per hour. With the cars in the south traffic lane, one following the other, with the distance between the cars of approximately 300 feet and the cars going at these respective speeds, appellee sounded his horn, turned his car over into the north traffic lane in an attempt to pass appellant's car. When the distance which separated the cars had been reduced to approximately 100 feet appellant turned his car to the left across the center of the pavement and into the traffic lane occupied



by appellee's car. The windows of appellant's car were closed and he did not hear any horn or signal given by appellee. He was unaware of the presence of appellee's car on the highway. He turned into the north traffic lane without giving any signal warning or indication of his intention to turn to the north. The law is that no vehicle shall be turned from a direct course upon a highway until the movement can be made with reasonable safety (Ill. Rev. Stat. Chap. 95 $\frac{1}{2}$ , Sec. 162).

Other than the position of the cars at the time of the impact, there is very little conflict in the evidence found in this record. The only questions presented by this record to this court are questions of fact. The conclusions arrived at by the trial court to the effect that appellant was negligent and that appellee was in the exercise of due care at the time and just before the collision are, in our opinion, sustained by the evidence. Clearly appellant was guilty of negligence and we are unable to say, as a matter of law, that under all the facts and circumstances shown by the record in this case, that appellee was <sup>not</sup> in the exercise of due care and caution for the safety of the automobile he was driving. The judgment of the trial court, therefore must be affirmed.

Judgment affirmed.













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